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## The Culture of Legal Denial

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# The Culture of Legal Denial

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*[The] question of guilty clients . . . is the oldest of the old, old questions for lawyers.<sup>1</sup>*

## I. INTRODUCTION

Basic morality teaches that if a person injures another, he should take responsibility for what he has done. Lawyers, by contrast, typically assist injurers in the reverse—denial. Legal culture masks the immoral as the normal. “You prove it,” says the defendant’s lawyer, “and if you cannot, then my client will not pay.” How did lawyers grow so comfortable in assisting injurers in a basic act of moral regression? Can this be changed?

In a prior essay, I addressed denial from the perspective of the client.<sup>2</sup> There I argued that, possible economic benefits notwithstanding, failing to take responsibility poses serious spiritual and psychological risks to injurers. Here I focus on the role of the lawyer. My goals are twofold. The first is to examine critically the practice of lawyers assisting clients in denying harms they commit and suggest some ways of changing that practice.<sup>3</sup> Lawyers commonly presume that their clients’ interests are best served by denial. Yet such a presumption is not warranted. Given the moral, psychological, relational, and sometimes even economic risks of denial to the injurer, lawyers should consider discussing responsibility taking more often with clients. The second is to explore several structural or systemic

1. Thomas L. Shaffer, *Should a Christian Lawyer Serve the Guilty?*, 23 GA. L. REV. 1021, 1023 (1989).

2. Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903 (2005) [hereinafter *Immorality*].

3. Though I will not address it here, the obverse problem of lawyers assisting clients in bringing unwarranted accusations also merits serious consideration.

factors that may reinforce the practice of denial seen day in and day out within our legal system.

Part II ("Clients and Lawyers") begins by critiquing lawyers who unreflectingly cater to, and sometimes even help create, clients' immediate desires for denial. As mentioned, the common presumption that a client's interests are best served by denial is highly questionable. Even if a lawyer anticipates that denial will benefit a client financially, a lawyer should not assume that such expected economic benefit outweighs possible moral, psychological, and relational costs to the client. Hence, under the existing professional ethics norms, lawyers should consider counseling clients about responsibility taking far more often than they do. The failure of lawyers to offer such counseling does not rest upon the strictures of legal ethics codes. Observe, however, that denial usually works to the lawyer's economic benefit through escalating the conflict and lengthening litigation.

For the lawyer who decides to discuss responsibility taking with a client, the question of how to do so requires careful consideration. Obstacles to such counseling include client reticence to disclose mistakes, the lawyer's fear of appearing judgmental or disloyal, and expectations by both lawyers and clients that the lawyer's essential role is to minimize the client's financial liability. ("Your job is to get me off. If I wanted someone to tell me to take responsibility for what I have done, I would have gone to a minister or psychologist.") Such obstacles, however, are not insurmountable, and can often be met with good client counseling. Critical to such counseling is a strong lawyer-client relationship based upon trust. Further, great rewards may await clients and lawyers who discuss responsibility taking. Responsibility taking after injuries can help clients maintain morally-grounded lives, and the lawyer who discusses that path with clients may discover a deepened sense of purpose in her work.<sup>4</sup>

Part III ("Some Structural Factors") shifts from the specific, "microscopic" lawyer-client interaction to the broader, "macroscopic" context within which the microscopic practice of denial occurs. How has the immoral path of denying rather than taking responsibility after injury become normalized within our legal system? How do lawyers become so comfortable being complicit in it? Such questions undoubtedly raise many other questions. Here I address several structural factors interwoven with the microscopic practice of denial. These are economic incentives in litigation, dispute resolution mechanisms, legal education, and aspects of our broader cultural composition including rights-based ideology and social denials of structural injustices. For each topic I consider whether and how such a factor may reinforce the

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4. Throughout this Article, for literary convenience, I use masculine terms to describe the client and feminine terms to describe the lawyer. No gender implications are intended.

practice of denial we see in ordinary disputes. I do not suggest that these factors alone explain our culture of legal denial. For example, as will be discussed in Part II, individualistic factors such as greed and shame avoidance by clients undoubtedly prompt much denial. Further, structural factors not discussed here (e.g., social mobility and anonymity among citizens, religious beliefs concerning atonement and forgiveness of sin, etc.) may also buttress the practice of denial we see in ordinary legal disputes. I select these four factors as they are closely tied to our legal system. Please note that I do not attempt an exhaustive treatment of any of these topics. Each topic is vast. Rather, my aim is exploratory—to suggest a few basic questions and hypotheses for future research.

Regarding economic incentives, I present a basic economic model illustrating that, under our compensatory damages system, denial is often the logical choice for injurers with primarily pecuniary motivations. If we wish to discourage denial, we ought to think seriously about the greater use of incentives, such as damage multipliers, to make denial economically costly. Regarding dispute resolution mechanisms, I argue that, when channeling cases into different dispute resolution mechanisms, we should consider that different mechanisms are likely to generate different levels of responsibility taking. For example, mediation, which creates direct encounters between parties, is more likely to foster responsibility taking than litigation, which keeps the parties separated.

Law schools provide a rich training ground for subsequent complicity in denial by teaching students to seek victory for their clients regardless of the merits. Critical to this education is the pedagogy of repeatedly emphasizing technical argumentation over feelings or moral sensibilities. As the extrinsic motivation of victory supplants the intrinsic motivation of seeking justice among law students, the seeds of both the public's lack of respect for the legal system and the severe levels of psychological distress found among lawyers are also sown. Further, law schools do a very poor job of teaching students about helping future clients handle their mistakes. In "Socratic" classrooms where the basic attitude toward errors is "not to make one" lest one be publically shamed before one's fellow students, students become ill-equipped to squarely address and discuss human error, both their own and, by extension, those of future clients.

Rights-based ideology, prevalent not only within law schools but within society generally, forms another piece of the denial picture. Within our culture, people, especially lawyers, commonly focus on individuals' rights and overlook individuals' responsibilities. Denial is almost always within an injurer's legal rights, but deeply at odds with his responsibilities. Social denial of structural injustices (e.g., regarding conquest and racism) is another aspect of our cultural composition

worth examining. Are there links between such “macroscopic” denials and the “microscopic” denials in ordinary law suits? A denial mindset of disregarding morality for profit’s sake is common to both settings, as is a lawyer readily adopting the mentality of obedience to a system’s rules to rationalize complicity with immoral acts.

Several introductory notes may be of use. First, for reasons I describe in greater detail elsewhere, my focus here is upon civil rather than criminal cases.<sup>5</sup> The criminal setting raises enough distinct issues (e.g., the Fifth Amendment right against self-incrimination, power disparities between the state and the accused, etc.) so as to merit separate treatment. Second, with minor exception, I will not address the influence of liability insurance on the injurer’s denial. Though I will comment on it at points, an in-depth treatment of this significant subject is also beyond the scope of this Article. Third, the discussion below works both within and outside what is commonly called the “zealous advocacy” framework.<sup>6</sup> Part II’s critique of lawyers assisting clients in denying harms they have caused, as well as the suggestion that lawyers consider discussing responsibility taking with clients, falls squarely within the zealous advocacy framework. Properly understood, existing legal ethics standards often require such consideration. Part III, by contrast, raises questions of a struc-

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5. See *Immorality*, *supra* note 2, at 905–06. For fine presentations in criminal law raising related concerns, see Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 Hous. L. Rev. 327 (1998) (speaking on the risk of psychological guilt to the guilty-in-fact criminal defendant who denies his guilt at law); Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. Rev. 1801 (1999) (commenting on the possibility of atonement through criminal punishment); see also JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989) (remarking on the role of shame in reintegrating criminals into society).

6. In recent years, attempts have been made to “soften” the level of zeal with which lawyers are to pursue their work. Compare, e.g., MODEL CODE OF PROF’L RESPONSIBILITY CANON 7 (1983) (“A lawyer should represent a client zealously within the bounds of the law.”), with MODEL RULES OF PROF’L CONDUCT R. 1.3 (2003) (“A lawyer shall act with reasonable diligence . . . in representing a client.”). However, the Comment to Rule 1.3 does provide, “A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. (2003). Such change notwithstanding, the grip of the “zealous advocacy” paradigm on the minds of lawyers is quite strong. See, e.g., Monroe H. Freedman & Abbe Smith, *Zealous Representation: The Pervasive Ethic, in UNDERSTANDING LAWYERS’ ETHICS* 71 (2004) (“This ethic of zeal . . . established in Abraham Lincoln’s day . . . continues today to be ‘the fundamental principle of the law of lawyering’ and ‘the dominant standard for lawyerly excellence.’”) (citations omitted); see also Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43–48 (1982) (describing the adversarial paradigm as lawyers’ “standard philosophical map”). On the historical development of the zealous advocacy framework, see Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991); Freedman & Smith, *supra*.

tural nature. While parts of the discussion hold implicit criticisms of the zealous advocacy framework, my goal here is not to criticize that framework *per se*, but rather to examine factors buttressing the practice of denial within that framework.<sup>7</sup> Most of this discussion is neither for nor against the zealous advocacy framework but largely outside of it.

The argument presented here is at its root a simple one flowing from the premise that it is immoral to deny responsibility for an injury one has committed. Some readers may find the picture painted too simple or "reductionist" and feel that the critique of denial has been pushed too far. My goal here is to identify and explore what I consider a largely unrecognized aspect of legal practice—a missing "piece of the puzzle." I do not mean to suggest that this missing piece forms the whole puzzle. Yet before a synthesis can be achieved between what is recognized and what is largely unrecognized, the unrecognized must first be recognized.

The eighteenth century founder of Hasidic Judaism, known as the Baal Shem Tov, once claimed that,

The chief joy of the Satan . . . is when he succeeds in persuading a man that an evil deed is a *mitzvah* [a deed commanded by God]. For when a man is weak and commits an offense, knowing it to be a sin, he is likely to repent of it. But when he believes it to be a good deed, does it stand to reason that he will repent of performing a *mitzvah*?<sup>8</sup>

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7. The zealous advocacy framework has received much scholarly attention by both supporters and critics. For some of the finest defenses of that framework, see MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975) (defending zealous advocacy on systemic grounds); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951) (emphasizing the combative, game-like quality of litigation); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (defending zealous advocacy based on client autonomy). There are many fine critiques as well. See, e.g., THE GOOD LAWYER (David Luban ed., 1983); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (envisioning lawyers as "lawyer-statesmen" who embody "prudence" and "practical wisdom"); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (attacking role ethics justifications of zealous advocacy) [hereinafter *ETHICAL STUDY*]; DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000) (writing on the need for considering legal ethics within institutional context); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998) (suggesting that lawyers should act in ways that promote "justice" or the "legal merits" of the case); RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* (1999) (decrying adversarial excesses); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988) (employing a historical critique of zealous advocacy, paying particular respect to communitarian rationales). For a summary of this ethical debate over the past three decades, see David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 877–80 (1999).
  8. Louis I. Newman, *The Baal Shem Tov*, in *CREATORS OF THE JEWISH EXPERIENCE IN ANCIENT AND MEDIEVAL TIMES* 287, 302 (Simon Noveck ed., 1985).

Our legal system masks the vice of denial after injury as a virtue. We have developed a culture of legal denial. To fix this problem, we must first understand it.

## II. CLIENTS AND LAWYERS

### A. Client Ethics

Before addressing the topic of denial, it is helpful to take a step back to understand the broader ethical domain within which that topic resides. When discussing ethics, lawyers almost always focus on *professional* ethics. As the name suggests, professional ethics concern the professional. Professional ethics address, for example, what ethical obligations a lawyer has to the client, to the court, and to third parties. Codes of professional ethics, such as the ABA Model Rules of Professional Conduct ("Model Rules") and the ABA Model Code of Professional Responsibility ("Model Code"), are paradigmatic of this focus. In the language of philosophers, these codes address role ethics, that is, the ethical obligations entailed when acting in a certain professional role.

In contrast, the root ethical issue raised by denial falls into a different, and sadly often overlooked, domain. One might call this the domain of *disputant* ethics, *client* ethics or, perhaps most basically, *interpersonal* ethics.<sup>9</sup> Consider questions like, "Are there times when taking revenge is morally acceptable?" or, "If a person apologizes for injuring me, must I forgive him?" These questions had ethical relevance long before mechanisms such as courts or professional lawyers existed. In legal conflict, lawyers are ultimately the secondary figures. They are the agents of the parties. The domain of disputant ethics addresses the ethics of the parties themselves. It explores how people should treat one another after injury or when in conflict. Within it we find matters such as apology and forgiveness, respect and revenge, and responsibility and relationships. The focus is on the ethics of the parties, not the ethics of the lawyers.

### B. Responsibility Taking as the Moral Response to Injury

A foundational question within the realm of disputant ethics is, "What should a person do who injures another?" The answer is so simple that even children know it. The ethical response to injuring another is to take responsibility for what one has done. Usually one should begin by apologizing. Next one should try to make amends, for example, by offering fair compensation to the injured party. Ideally

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9. For further discussion, see Jonathan R. Cohen, *A Taxonomy of Dispute Resolution Ethics*, in *HANDBOOK OF DISPUTE RESOLUTION* (Robert Bordone & Michael Moffitt eds., forthcoming 2005).



the injurer and the injured will have a direct dialogue through which a remedial plan acceptable to both is established.<sup>10</sup> In short, the injurer should *actively* take responsibility for what he has done. Conflict is not the inevitable result of injury. Where an injurer fails to take responsibility after an injury, conflict is quite likely. Conversely, the ethical path of active responsibility taking by the injurer usually results in relational repair and speedy private settlement. The injurer's choice of whether to take responsibility voluntarily is often simultaneously a choice of whether cooperation or conflict will ensue.

The response where the injurer denies responsibility is, by contrast, an act of moral regression. It compounds the primary injury with a secondary one. Even if the injured party can prevail at trial—and often the injured party cannot, either from lack of evidence or from the skill of the injurer's lawyers—such compensation will be delayed and usually reduced by the cost of the injured's legal fees, commonly one-third for a contingency case. Further, in terms of the *injurer's* morality, passive accountability enforced by a court is not an ethical substitute for voluntary, internally-chosen responsibility taking.<sup>11</sup> The former, though certainly necessary where an injurer fails to take responsibility, can hardly be called ethical behavior by the injurer at all, while the latter reflects the true internalization of ethical norms. Note too that the injurer who fails to take responsibility puts himself at serious psychological risk.<sup>12</sup> The guilt of not making amends, even if not consciously recognized, can be haunting. Also of note is what one might call relational risk.<sup>13</sup> Many injuries occur in the context of prior relationships (e.g., family, business, neighbor, etc.) and until the injurer makes amends it can be impossible for those relationships to go forward. Finally, many also see failing to take responsibility as placing the injurer at spiritual risk. For example, both Christian and Jewish scriptures advise injurers to first make amends with injured parties before seeking Divine forgiveness.<sup>14</sup>

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10. There are, of course, circumstances where direct dialogue may be inappropriate, even with a mediator present. See, e.g., Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1983) (arguing mediation is inappropriate where domestic violence exists).

11. See *Immorality*, *supra* note 2, at 920–23.

12. See *id.* at 933–37.

13. See *id.* at 922.

14. In Judaism, see, for example, MISHNAH YOMA 8: 9 (“For transgressions against God, the Day of Atonement atones, but for transgressions against another human being, the Day of Atonement does not atone until one has made peace with that person.”). In Christianity, see, for example, *Matthew* 5: 23–24 (“Therefore if thou bring thy gift to the altar, and there rememberest that thy brother hath ought against thee; Leave there thy gift before the altar, and go thy way; first be reconciled to thy brother, and then come and offer thy gift.”). For further discussion, see *Immorality*, *supra* note 2, at 929–32.

If the ethical response of taking responsibility for injury is so clear, and if failing to follow that response poses significant moral, psychological, relational, and perhaps even spiritual risks to injurers, then why do so many injurers fail to take responsibility? Later I explore the contribution of our legal system and legal culture to that practice, but first let us recognize two factors internal to the injurers themselves: greed and shame.<sup>15</sup> Despite knowing that responsibility taking is the ethical response to injury, many injurers place money before morality. They fear, sometimes rightly and sometimes wrongly, that responsibility taking will be more costly economically than denial, and, consciously or not, overlook their moral obligation for financial reasons. For example, an injurer with solely pecuniary motivations may see denial largely as a no-lose gamble. "If the denial succeeds, I will pay nothing, but if the denial fails I will just have to pay what I would if I took responsibility directly. So why shouldn't I deny?"<sup>16</sup> Yet greed is not the only motivation for denial. Indeed, it may not even be the primary one. Sociopaths aside, most people who commit injuries experience guilt for what they have done, whether consciously or subconsciously. That guilt can readily translate itself into a feeling of internal shame.<sup>17</sup> To take responsibility is to face one's shame squarely—to bring it out in the open. Yet, like the child who lies when caught with his hand in the cookie jar, many injurers unreflectingly choose to deny. Though such does not provide a basis for moral excuse, their denials and other avoidances reflect a shame-avoidant myopia, the belief that they can avoid facing the shame of their error altogether if only they can avoid facing it now.<sup>18</sup> As Mark Twain's *Huckleberry Finn* put it, "That's just the way: a person does a low-down thing, and then he don't want to take no consequences of it. Thinks as long as he can hide it, it ain't no disgrace."<sup>19</sup> Sadly such responses usually escalate the conflict and ultimately compound the injurer's sense of shame.

Though it is possible to raise some (largely unsatisfactory, in my view) moral defenses to the approach of denial after injury (e.g., based upon the possibility of generating fairer ultimate settlement out-

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15. See *Immorality*, *supra* note 2, at 938 (discussing greed), 940 (discussing shame avoidance).

16. For further discussion, see *infra* section III.A.

17. See *Immorality*, *supra* note 2, at 935.

18. See *id.* at 940.

19. See 8 *THE WORKS OF MARK TWAIN: ADVENTURES OF HUCKLEBERRY FINN* 268 (Victor Fischer et al. eds., 2003). Though *Huckleberry Finn* is an American classic, it is also a very problematic work. See SHARON RUSH, *NEVER THE TWAIN SHALL MEET: HUCKLEBERRY FINN AND THE COLOR LINE* (forthcoming 2004) (arguing teaching *Huckleberry Finn* creates emotional segregation among Black and non-Black children).

comes), I will not explore these here.<sup>20</sup> Let me mention, however, two serious and related issues: ambiguity and prematurity. Some may assert that questions of fault, both moral and legal, are typically complex and ambiguous. They may argue that for a person unilaterally to take responsibility prior to full legal proceedings is premature. "Fault is only known after a court has passed its judgment, not before." Elsewhere, I respond to this argument at greater length, but let me make a few basic points here.<sup>21</sup> First, in many instances of injury, fault, in both moral and legal senses, is quite clear to one such as an injurer who knows the facts.<sup>22</sup> We should not let the complexity of some cases lead us into believing that fault is always ambiguous. To assert that a person who injures another should never take responsibility absent full legal proceedings is simply untenable. Many injurers quite rightly assume responsibility of their own initiative day in and day out. Second, where fault is ambiguous, say because of factual or legal ambiguity, possible "injurers" should *not* take responsibility on their own, but, generally speaking, await a court's determination. Third, where parties know they are at fault in one area but unsure of the extent of their fault in another area, they should at least take responsibility for the former area. Finally, though a party may not initially be sufficiently aware of facts to properly accept responsibility, when an injury or claim of injury occurs, the putative injurer has some duty of investigation to determine what occurred and should take responsibility, if appropriate, after such ambiguities are resolved.

### C. The Typical Pattern of Denial

In contrast to the moral path of active responsibility taking, lawyers commonly lead injurers in the opposite direction: responsibility avoidance. Key to this path are both silence and denial.<sup>23</sup>

Suppose a client who has injured another enters a lawyer's office. What is likely to happen? Soon into the conversation, the client will share his story with the lawyer. The client's account may or may not

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20. See *Immorality*, *supra* note 2, at section IV.B.

21. See *id.* at subsection IV.B.3.

22. Legal and moral fault can of course differ. For example, in American legal ethics discourse, there is a debate dating back to David Hoffman's 19th-century remarks on whether a lawyer should assert a statute of limitations defense to an otherwise just debt. See DAVID HOFFMAN, A COURSE OF LEGAL STUDY 754 (2d ed. 1972) (1836).

23. Twenty-five years ago, William Felstiner et al. famously described the injured party's steps toward litigation as "naming, blaming, and claiming." See William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81). By way of parallel, the injurer's steps toward litigation might be described as "injuring, avoiding, and denying." Perhaps empirical research will someday be conducted on this latter topic assessing the frequency at which each stage is reached akin to Felstiner et al.'s earlier research.

include an admission of fault, but it probably will indicate that the injured party has filed or is likely to file a claim. If she has not done so already, usually the lawyer will instruct the client to cease communicating with the other party. "It is best to let me do the talking. Anything you say to the other side can be used against you in court. You can talk with me, and you can talk with your spouse if you want, for those conversations are protected by legal privileges. By the way, be careful even when speaking with friends. They can be subpoenaed and made to testify to your conversations."

The message that injurers should refrain from communicating about the case and only speak, if at all, after the lawyer grants permission is so well known that many clients internalize it before they see their lawyer. As a sheriff who was removed from office for public drunkenness said to the press in explaining his refusal to comment on his case, "I'm seeing an attorney (today), and as soon as he tells me [what] I need to say, then I can talk to you."<sup>24</sup> A similar theme is found in instructions sent by some insurance companies to their insured motorists instructing them not to apologize if they are in an accident.<sup>25</sup> Perhaps most basically the public learns this lesson through the celebrated *Miranda* warnings in the criminal context: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to be speak to an attorney, and to have an attorney present during any questioning."<sup>26</sup> The lesson is simple: statements made to the other side could be used against you in court, so remain silent and let your lawyer do the talking.

If the lawyer does start speaking for the client, that pattern of silence is likely to continue, if not grow into outright denial. Should the lawyer speak with the other party, it is extremely unlikely that she will admit her client's fault. An exception helps prove the rule here. In 1987, the Veterans Affairs Medical Center in Lexington, Kentucky ("Lexington VA") switched from the widespread "deny and defend" approach of responding to medical errors<sup>27</sup> to an approach of responsibil-

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24. Karen Voyles, *Lafayette Sheriff Is Relieved from Duty*, GAINESVILLE SUN, Aug. 22, 2002, at A1.

25. See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1012-13 n.9 (1999) [hereinafter *Advising Clients*].

26. There is no single form to the *Miranda* warnings mandated by constitutional law. The quotation above is among the most common and simple language.

27. See Rachel Zimmerman, *Doctors' New Tool to Fight Lawsuits: Saying 'I'm Sorry'*, WALL ST. J., May 18, 2004, at A1 (describing "deny and defend" as the traditional approach to responding to medical errors); see also Marianne D. Mattera, *Memo From the Editor: Better to Beg Forgiveness?*, MED. ECON., June 4, 2004, at 5 ("[I]t's long been a tenet of liability insurers that you never admit a mistake or apologize for a mishap, lest it come back to bite you in court.").

ity taking.<sup>28</sup> This involved admitting fault, apologizing, and offering fair compensation.<sup>29</sup> Although the responsibility-taking approach to medical error has since grown markedly<sup>30</sup>—in part because this moral response has proved financially viable<sup>31</sup>—when the Lexington VA implemented that approach, most lawyers who learned of it were highly skeptical. As hospital attorney Ginny Hamm stated, “The attorneys around here in Lexington [thought] we were *crazy*.”<sup>32</sup> The moral response to injury is commonly viewed by the legal community as bizarre.

And how will the lawyer respond if the other side files a complaint? Typically the response will be denial, or at least the denial of everything that arguably can be denied.<sup>33</sup> The lawyer will admit to facts both inconsequential and indisputable. Matters of consequence, however, are likely to be disputed. Notwithstanding that (a) modern federal civil pleading practice takes a liberal attitude toward discovery<sup>34</sup> and permits a general denial only where the defendant “intends in good faith to controvert all the averments” of the plaintiff’s complaint,<sup>35</sup> (b) Rule 36 provides that a party’s denial in response to a request for admission must “fairly meet the substance of the requested admission,”<sup>36</sup> and (c) the unwarranted denial of a factual contention is an explicitly enumerated basis for Rule 11 sanctions,<sup>37</sup> the reality in practice still has a strong residue of general denials and demands of strict proof. As attorney Dmitry Feofanov writes:

Every lawyer (including myself) has been told by his or her mentors that the “right way” to respond to certain allegations in a complaint is as follows: if the complaint alleges that a document says so-and-so, respond, “the document speaks for itself.” If the complaint alleges that venue is proper, respond, “calls

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28. Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447, 1451 (2000) [hereinafter *Apology and Organizations*].

29. *Id.* at 1452–53.

30. See Zimmerman, *supra* note 27 (discussing the growth of apology in medical practice); Jonathan R. Cohen, *Toward Candor after Medical Error: The First Apology Law*, 5 HARV. HEALTH POL. REV. 21 (2004) (discussing the rise of new laws to exclude medical apologies from admissibility into evidence) [hereinafter *Toward Candor*].

31. See *Apology and Organizations*, *supra* note 28, at 1453–54; Zimmerman, *supra* note 27.

32. *Apology and Organizations*, *supra* note 28, at 1449 (emphasis added) (quoting Lexington VA attorney Ginny Hamm, who served both as the hospital’s counsel and as a member of its risk management committee).

33. A similar approach holds in depositions, where witnesses are coached to say no more than they must.

34. See FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . .”).

35. FED. R. CIV. P. 8(b).

36. FED. R. CIV. P. 36(a).

37. FED. R. CIV. P. 11(b)(4).

for legal conclusion." Add, "to the extent there remain any factual allegations, they are denied." If an allegation cannot be denied, ask for "strict proof."<sup>38</sup>

The bench too is aware of the pervasiveness of denial. For example, "[a]fter years of unsuccessful efforts to correct a gaggle of fundamental pleading errors [i.e., different forms of denial] that continue to crop up in responsive pleadings," Senior United States District Judge Milton Shadur issued what was in essence a cautionary opinion to the Bar at large, listing, analyzing, and warning against the use of the most common forms of pleading evasion in his jurisdiction.<sup>39</sup>

Why do lawyers do this? The strategic rationale may be summarized in one word—caution.<sup>40</sup> "We can always admit something later, but if we admit it now, there is no going back. Let's take some time to see what develops and be sure we are on top of the facts." The defense lawyer might add a further point: "If we don't deny, the rules state that we will be taken as having admitted everything the plaintiff asserts."<sup>41</sup> Once a complaint has been filed (and it's almost always written in plaintiff-biased language), we cannot be neutral. Silence is not really an option, for if we simply say nothing, that has the effect of an admission. Despite initial appearances, the rules are actually cast in favor of our denying."

So normalized is the denial modality that, should a settlement be reached, even in cases where, realistically speaking, all the parties recognize the fact of the injurer's wrongdoing, a usual term in the settlement will be a disclaimer of any wrongdoing by the injurer. Coca-Cola's recent settlement of racial discrimination claims is illustrative. Under the settlement, the largest such settlement in U.S. history,

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38. Dmitry N. Feofanov, *Of Speaking Documents and Talking Clams: A Proper Answer Under Federal and State Rules*, DCBA BRIEF ONLINE (JOURNAL OF THE DUPAGE COUNTY BAR ASS'N) (Nov. 2002), at <http://www.dcba.org/brief/novissue/2002/art21102.htm> (last visited Aug. 5, 2005); see also David J. Luban, *The Ethics of Wrongful Obedience*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 94 (Deborah L. Rhode ed., 2000).

Every litigation associate goes through a rite of passage: she finds a document that seemingly lies squarely within the scope of a legitimate discovery request, but her supervisor tells her to devise an argument for excluding it. As long as the argument isn't frivolous there is nothing improper about this, but it marks the first step onto the slippery slope. For better or for worse, a certain kind of innocence is lost. It is the moment when withholding information despite an adversary's legitimate request starts to feel like zealous advocacy rather than deception.

*Id.* at 106.

39. See *State Farm Mut. Auto. Ins. Co. v. Riley*, 199 F.R.D. 276, 278 (N.D. Ill. 2001).

40. Observe, however, that risks attach to *both* admitting responsibility (e.g., one's admission being used against one in court) and denying responsibility (e.g., relational damage from denial may lead to an escalation of hostilities).

41. See *FED. R. CIV. P.* 8(d) ("Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleading.").

Coca-Cola agreed to pay \$156 million, but admitted no fault.<sup>42</sup> Assuming, *arguendo*, Coca-Cola actually was at least in part at fault, what would have been so wrong if, when reaching the settlement, Coca-Cola had admitted its fault?<sup>43</sup> Some may contend that Coca-Cola is unusual, that it had concerns about negative publicity and suits by parties who did not join the settlement. But in essence it is not. The usual civil settlement is of a no-fault form: the injurer pays money, the injured releases the injurer from all present and future claims, and the injurer admits no fault. But why should not the injurer (verbally) acknowledge fault along with the payment? Some claim that, "The payment is the acknowledgment of fault." Such a statement simply reflects how socially-entrenched the pattern of denial is. How strange it is that the verbal admission of fault is often harder to extract than a payment.

Query too whether our courts should rubber-stamp such settlements that are predicated on fault avoidance. On the one hand, such settlements may foster private dispute resolution and docket clearing, and may also avoid the efforts that might need to be expended to describe the extent of fault. On the other hand, such settlements may have an anti-therapeutic, "band-aid" effect, helping the injurer to patch over but never fully address the roots of the injury, thereby increasing the likelihood of reinjury.<sup>44</sup> Further, and perhaps most fundamentally, is the issue of the linkage between our courts and truth. Unlike purely private settlements, many settlements to court cases become court orders. The imprimatur of the courts is upon them. Our courts articulate the pursuit of truth and justice as central ideals. It seems plausible that our courts may have an interest in not lending their name and power to settlements with significant components of nondisclosure if not falsity.

### 1. *Denial Reinforcement, Fault Projection, and Conflict Escalation*

The lawyer's denials are likely to produce several negative consequences. Three of the most salient are reinforcing the injurer's denial, projecting fault on the injured party, and overall conflict escalation.

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42. See Greg Winter, *Coca-Cola Settles Racial Bias Case*, N.Y. TIMES, Nov. 17, 2000, at A1.

43. For further discussion and examples, see Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 854-55 (2002).

44. For an argument against allowing criminal *nolo contendere* and *Alford* pleas in which fault is also not admitted based on such anti-therapeutic effects, see Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (2003).

The external story of denial the lawyer pens will likely serve to reinforce any internal sense of denial the injurer may have. Parties in conflict commonly have fairly strong, self-serving cognitive biases.<sup>45</sup> Further, whether or not the story is true, by writing the story one is led to believe it.<sup>46</sup> Thus, the external act of legal denial may promote an internal psychological denial by the client. The story advanced in the written legal denial may become a piece of the mask the client uses to prevent himself from squarely facing his acts.<sup>47</sup> Further, in many cases, a denial-based collusion of sorts may arise between the client and the lawyer. "I the client want to believe a narrative proclaiming my innocence that you the lawyer will help write. Moreover, I am concerned that if I tell you the truth—that I was at fault—you will not fight for me as vigorously." "I the lawyer do not want to know everything that you have done, for I want to write a narrative proclaiming your innocence, and not only may my ignorance be of strategic benefit at trial,<sup>48</sup> but it is easier for me (e.g., there is less cognitive dissonance and value conflict for me) if I think you are innocent, or at least do not know you are guilty."

Psychologists often speak of the linkage between denial and projection. Projection is a process of unconsciously attributing to the other person characteristics of oneself that one denies to oneself. Like slave-owners who saw slaves rather than themselves as "lazy," or invading "settlers" displacing natives they saw as "nomadic," the very faults one refuses to recognize in oneself one may project onto others.<sup>49</sup> A somewhat analogous process takes place in many legal disputes, though now the denial and projection are conscious processes.

Suppose an accident has occurred through the injurer's negligence. How is the accident to be explained? If the injurer denies that he was

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45. For references, see Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 206 n.199 (2000).

46. See, e.g., E. Tory Higgins & William S. Rholes, "Saying Is Believing": *Effects of Message Modification on Memory and Liking for the Person Described*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 363 (1978).

47. On such legal masking of persons, see generally JOHN T. NOONAN, *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WHYTHE AS MAKERS OF THE MASKS* (1976); Walter O. Weyrauch, *Law as Mask: Legal Ritual and Relevance*, 66 CAL. L. REV. 699 (1978).

48. The allusion here is that the lawyer's willful or contrived ignorance might benefit the client by in essence helping the client or his witnesses commit perjury at trial. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2003) ("A lawyer shall not knowingly offer evidence . . . that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."). On such contrived ignorance, see David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 980–81 (1995).

49. See Albert Memmi, *Mythical Portrait of the Colonized*, in *THE COLONIZER AND THE COLONIZED* 79, 79–89 (1991).



at fault for the accident, then he must assert that someone or something else caused the accident.<sup>50</sup> And who is most likely to become the target of such projection? None other than the injured party. "If I did not cause the accident, you must have," the injurer decides.<sup>51</sup> Perhaps the injurer will go so far as to file a counterclaim. From the injured party's perspective, the situation is quite remarkable: "You injure me, and not only don't you compensate me, but you have the gall to claim that I have injured you!"

As should be clear, the injurer's choice of whether to take or deny responsibility strongly influences the course the dispute will take. The injurer's response is often a crossroads or tipping point for the subsequent encounter.<sup>52</sup> Accepting responsibility usually yields swift settlement, while denying or failing to take responsibility usually produces conflict escalation. Recall that many injuries occur by accident. The injurer had no intention of committing harm. The decision not to take responsibility, by contrast, is usually a deliberate choice. Had the injurer accepted responsibility, including offering compensation, the injured party may have forgiven, at least in the sense of reducing anger. But where the injurer denies or fails to take responsibility, hostilities usually grow.

## 2. *Lawyers Benefit from Conflict Escalation*

Are the economics of lawyering an important driver of the practice of denial? Unlike the plaintiff lawyer who works on a contingency fee, most defense lawyers earn their livelihood from the process of litigation. As a litigation partner who represented corporate defendants at a law firm where I once worked joked (I paraphrase), "Our good clients come to us ahead of time seeking advice about how to avoid a lawsuit. But our best clients come to us after the fact."

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50. Implicit here is the binary conception of fault common within much legal thinking, critiqued long ago by John Coons in his call for the apportionment of responsibility. See John E. Coons, *Approaches to Court-Imposed Compromise—The Uses of Doubt and Reason*, 58 Nw. U. L. Rev. 750 (1964). For further discussion and references, see Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 20–21 (2004). Though I will not explore it here, I would note as well the possibility that responsibility need not be divided solely among the parties (so their shares of responsibility sum to one), but that richer understandings of causality that recognize the role of circumstance (e.g., "It was just an accident. No one was at fault.") may also be possible. For a brief discussion, see *Apology and Organizations*, *supra* note 28, at 1462.

51. See ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 280 (1990) ("A typical problem arises from the client's inclination to blame others for the consequences of his or her own conduct.").

52. See THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 99–110 (1978).

I am not asserting that most defense lawyers consciously decide against counseling responsibility taking at the outset of the case based on economic self-interest. Most are aware of the professional requirement to put their clients' interests before their own and would not, I suspect, consciously do otherwise. Yet the obliviousness of many defense lawyers to the possibility of discussing responsibility taking with their clients does work to the lawyer's economic benefit. Not only might the defense lawyer's legal fees for the instant case be reduced if it settles rapidly, but her reputation as a "tough litigator," critical for attracting future clients, may be damaged. If one-third of an apology had monetary value, I suspect many more plaintiffs' lawyers would seek apologies.<sup>53</sup> If advising responsibility taking increased a defense lawyer's billable hours, I suspect many more would talk about that path with clients.<sup>54</sup>

### 3. *Some Objections*

Can the typical practice of failing to consider talking with injurers about responsibility taking be defended? Usually that practice is done automatically, so possible justifications are never offered. In a previous work, I suggested and largely rejected one possible justification—that ultimately fairer results could occur when the injurer denies responsibility.<sup>55</sup> Here I consider, and largely reject, several other possible responses. These are: (1) that denial is permitted if not required by the ethics of zealous advocacy; (2) that lawyers already do discuss responsibility taking with clients; (3) that the lawyer cannot simply know whether the client is guilty-in-fact or innocent-in-fact, and given that ambiguity, the safe route is to assume the latter; and (4) that if the lawyer raises the possibility of responsibility taking with the cli-

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53. See *Advising Clients*, *supra* note 25, at 1045.

54. Though I suspect counseling responsibility taking will generally work against a defense lawyer's economic interests, countervailing factors may exist. First, the lawyer may offset some of the billable hours she loses litigating with increased billable hours spent in client counseling, for, as discussed below, effectively counseling responsibility taking often takes some time. Second is the possibility that the lawyer, like some collaborative lawyers, may increase her client base by developing a reputation as a wise counselor. Though fees per client may decrease, the overall number of clients may rise.

55. See *Immorality*, *supra* note 2, at subsection IV.B.2. The claim against responsibility taking runs roughly as follows. If split-the-difference forces drive settlement outcomes, then an initial denial of fault by the injurer could ultimately lead to a fairer result than an initial acceptance of fault. Note, however, that the Federal Rules of Civil Procedure provide that if an offer of settlement is made and rejected and if "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." FED. R. CIV. P. 68. This provides a strong incentive for a plaintiff who receives a fair offer to accept it, and for the defendant who makes a fair offer to stick to it.

ent, the lawyer risks alienating the client. While I largely reject these possible responses, I believe much can be learned from their consideration.

*a. The Defense of Zealous Advocacy*

A first response for many lawyers is to seek refuge in the ethics of zealous advocacy. "Who are you to suggest that I defend clients out of personal greed, putting my interest before theirs? Did you learn nothing of legal ethics? I am duty bound to be a zealous advocate for my client. To do anything less than fighting with all my efforts on behalf of my client would be shirking my professional duty." They might invoke Lord Brougham's famous call toward thick-skinned battle,<sup>56</sup> or may turn to the words of the adversary system's greatest modern defender, Monroe Freedman:

In the adversary system, it is not the role or function of the advocate to act upon conclusions of ultimate facts such as guilt or innocence. That function is assigned to the judge or jury, which bases its decision on the adversaries' presentation of their clients' cases. Thus, the fact of guilt or innocence is irrelevant to the role that has been assigned to the advocate.<sup>57</sup>

The vision of the lawyer as a zealous advocate, fighting relentlessly on behalf of her client, is a powerful one.<sup>58</sup> The problem, however, is in what one might call the *advocacy bias* in legal representation, that is, in reducing the lawyer's entire role to that of a partisan combatant in litigation.<sup>59</sup> (Observe that my goal in this Article is not to enter the

56. Lord Brougham stated,

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

2 TRIAL OF QUEEN CAROLINE 3 (James Cockcroft & Co. 1874).

57. FREEDMAN, *supra* note 7, at 57.

58. See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1983) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"); EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law. . .").

59. See generally Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978) (arguing for differentiated legal ethics standards for different tasks); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997) (similar). Observe too that Lord Brougham began his statement with the important qualification, "[a]n advocate," not "a lawyer" or "an attorney." See *supra* note 56. It may be helpful to recall here the British division between solicitors, who focus significantly on legal counseling, and barristers who argue in court. The American approach of merging these two functions into a single professional, the lawyer, yields problems (though of course some benefits too), for ethical norms (e.g., of partisanship and zeal) perhaps appropriate for debate in court carry poorly to other areas. See

longstanding debate about whether and how a lawyer should *advocate* for guilty clients,<sup>60</sup> but, roughly put, to explore how lawyers should *counsel* guilty clients.<sup>61</sup> Lawyers serve their clients not only as advocates, but also as counselors. The Comment to Model Rule 1.3 articulates this often overlooked distinction well: "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf." The lawyer's ethical duty, in other words, is not zealous advocacy *per se* but acting "in a manner consistent with the best interests of his client."<sup>62</sup> Zealous advocacy is a means or technique, but not an end. As a first approximation (for lawyers of course have other duties as well), the client's best interests are the general end of legal representation.

Recognizing that the lawyer should act in the best interests of the client implicates two fundamental questions: (1) what are the client's best interests, and (2) what technique or approach will best serve those interests? In response to the first question, most civil defense lawyers presume that the client's "best interests" means the client's best *financial* or *pecuniary* interests.<sup>63</sup> But why should that presumption be made? Do not clients have moral, psychological, relational, and spiritual interests as well? Failing to pay compensation for an injury one has caused can be financially beneficial, but it can be harmful to the injurer in these other ways. How can the lawyer know *a priori* which outweighs which? She cannot. The common practice of automatically reducing the client's "best interests" to "best financial interests" is in error.

A second common error is assuming that, even if a client's ends are purely financial, the most effective strategy for pursuing them is a combative one. Even from the pecuniary viewpoint, compromise can sometimes be more effective than combat. The experience of the Toro Corporation ("Toro"), a manufacturer of lawn care products, is telling. For years, Toro responded with an aggressive "litigate everything"

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*infra* note 161. Roughly put, this Article concerns the mistake of unreflectingly carrying the lawyer-as-barrister's approach of denial to the role of the lawyer-as-solicitor.

60. In American discourse, that debate begins with 19th-century Hoffman-Sharwood dialogues. For a description and references, see THOMAS L. SHAFFER, *The Problem of Representing the Guilty*, in *ON BEING A CHRISTIAN AND LAWYER* 57, 57-69 (1981). It has continued with the many modern discussions of the ethics of zealous advocacy. For references, see *Immorality*, *supra* note 2, at 907 n.11.

61. For two fine works in this vein, see THOMAS L. SHAFFER, *The Problem of Ministry to the Guilty*, in *ON BEING A CHRISTIAN AND LAWYER*, *supra* note 60, at 71, 71-79 (1981); Cochran, *supra* note 5.

62. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-9 (1983).

63. For a critique, see Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L. J. 39, 57 (1985). Similarly, most criminal defense lawyers presume "best interests" means minimum time in jail.

strategy to the roughly 125 annual personal injury claims arising from the use of its products.<sup>64</sup> In 1991, amidst (like the Lexington VA) much skepticism from the Bar, Toro switched to a conciliatory mode of response, seeking to mediate cases and making what it saw as fair offers of compensation in mediation. Following this change, Toro's average total cost per claim fell from \$115,620 to \$30,617. By 1999, Toro had saved over \$75 million by switching from a combative to a conciliatory approach.

*b. Counseling Clients About Such Matters Already Occurs*

Another response is not to fight the criticism that lawyers should think about discussing responsibility taking with clients, but to suggest that they already do. This argument may branch in one of three directions.

A first branch stresses the strategic benefits of conceding adverse facts at trial. Some attorneys may reason, "surely a good lawyer needs to know the weaknesses of her client's case. It is better to present damaging facts to the jury on direct examination than to have them brought out on cross examination. Even if her concern is only strategy, the lawyer who ignores the weaknesses of her client's case is foolhardy." Though I accept the innoculatory efficacy of disclosing weaknesses at trial, a trial strategy of conceding weaknesses is very different from a philosophy of actively accepting responsibility. As discussed, the passive accountability a trial can produce by no means fully substitutes for active responsibility taking. For example, if the injured party lacks sufficient evidence to prove its burden, morality still calls for the injurer to actively take responsibility. A rationale of strategic concession, by contrast, would suggest the injurer remain silent at trial for disclosure would be strategically disadvantageous.

A second branch of justification points to the general importance of moral counseling in legal representation. This idea is reflected, for example, in calls within both the Model Rules and Model Code for lawyers to discuss moral dimensions of cases with clients.<sup>65</sup> In so far as it goes, such a view is accurate—discussing moral matters with clients is undoubtedly a proper part of legal representation. The problem with this justification is that, with rare exception, this particular moral matter, which is among the most significant moral matters in legal

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64. For more details about Toro, see *Apology and Organizations*, *supra* note 28, at 1460–61.

65. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1983) (similar).

representation, is usually not discussed explicitly. Further, discussing responsibility taking with clients can be quite different from discussing many other moral considerations. Consider, by contrast, a fine example offered by Shaffer and Cochran in their classic legal ethics text. They ask whether a residential property owner should raise legal objections to a proposed zoning change that would permit a nearby residence to be turned into a group home for developmentally challenged men, thus possibly harming property values in the neighborhood.<sup>66</sup> There are, no doubt, important ethical considerations at stake. Yet such a client is likely to be relatively comfortable talking about them, for any mistakes he might make are prospective in nature. The person who has injured another, by contrast, is likely to feel ashamed about what he has already done, making a moral dialogue with the client far more challenging.<sup>67</sup>

A third branch of justification suggests that lawyers already do talk with clients about responsibility taking. Some may argue: "One should not be overly-cynical or simplistic. Lawyers are not mindless hired guns. They are counselors too. As counselors, they often help clients face issues that are difficult for those clients to face. While lawyers may not often use the term 'responsibility taking,' it is wrong to suggest that lawyers never talk with clients about having to face matters clients would rather avoid."

If it is true that lawyers commonly discuss or even think about discussing responsibility taking with clients, then I will happily pack up my bags and go home. At this point in time, however, I do not think this is the case. Like the criminal law presumption of "innocent until proven guilty," the normal mode of civil defense is to deny.<sup>68</sup> (The very word "defendant" is suggestive of this: the defendant *defends* against the charge.) Lawyers who impress upon clients adverse facts commonly do so late in the dispute, often with the goal of "softening" their own client about the possibility of settlement.<sup>69</sup> Further, the perspective underlying such conversations tends to remain that of liability minimization.

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66. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 116-34 (1994).

67. See DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 10-11 (1977) (identifying the client's shame about mistake, which they label the "ego threat," as a primary barrier to full disclosure by the client to the lawyer).

68. Some may ask whether empirical data exists showing the frequency with which lawyers discuss responsibility taking with clients. To my knowledge, such data does not exist. (Such counseling occurs, of course, in private lawyer-client interactions.) However, from both conversations with numerous lawyers and many anecdotal accounts (e.g., the Bar's reaction to the Lexington VA's approach), I think it fair to say that the normal approach to civil defense is denial.

69. See *infra* section III.B (discussing lawyers use of mediation to indirectly break bad news to clients).

c. *The Lawyer's Epistemological Demurrer*

A third line of response focuses on the lawyer's lack of knowledge. "When a client enters my office, he does not come with a label of 'innocent' or 'guilty' attached. One only knows these things after trial, not before. Further, even if the client does remember the facts accurately—and often they do not—many, especially the 'guilty' ones, are less than candid with me about what happened. The terminology of 'injuror' you use simply is not helpful. What I have are clients, and I cannot know which are 'injurers' and which are not.<sup>70</sup> How then can I speak with them of responsibility taking?"

Such reasoning, called by Deborah Rhode the lawyer's "epistemological demurrer," is often offered to justify the lawyer's partisanship.<sup>71</sup> Though this excuse *qua* justification may be critiqued in a variety of ways, it contains an important element of truth. In many cases, the proposition is true that the lawyer does not know whether her client is innocent-in-fact or guilty-in-fact.

The flaw in the argument, however, is in moving from this proposition to the conclusion that the lawyer should not discuss responsibility taking with clients. First, often lawyers do know or can determine with confidence the merits of their client's claims.<sup>72</sup> Second, and more fundamentally, a lawyer need not know with certainty whether the client is innocent-in-fact or guilty-in-fact to consider discussing responsibility taking with the client. When it comes to responsibility taking, the critical issue is not what the lawyer knows to be true but rather what the client knows to be true. To use an analogy, many great sports coaches are not themselves great athletes. Rather, what great coaches know best is how to *assist* athletes. So too legal counselors do not usually know all that their clients know. Indeed, many clients, especially those who have committed injuries, are reticent. Yet the challenge of providing legal counseling that assists the client in making the best choices for himself still remains. Even if she does not know with certainty that the reticent client is guilty-in-fact, a good

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70. As Paul Tremblay states, "[I]n law offices, clients and client agents do not present unambiguous stories of injustice, corruption, or unconscionability. Well, maybe they do, but it is always *the other side* who fits that description." Robert F. Cochran, Jr., et al., *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 621 (2003).

71. See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 618–20 (1985).

72. Such views are common. See, e.g., FREEDMAN, *supra* note 7, at 53; Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1039 (1975); Rhode, *supra* note 71, at 619. One of the leading models of ethical lawyering even rests in part on this view. See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1089–90 (1988) ("[T]he central thrust of the approach defended in this essay is to insist that the [lawyer's] decision[s] should often turn on 'the underlying merits.'"); SIMON, *supra* note 7, at 9.

lawyer might help the client who does know with certainty that he is guilty-in-fact think about the possibility of responsibility taking.

*d. Client Alienation*

Though in its specifics it may take numerous forms, a fourth justification of the defense lawyer's usual approach focuses on the risk of client alienation. "Many clients come to me precisely with the expectation that I will help them deny. If they wanted someone to tell them to take responsibility, they would have gone to a minister or psychologist. If I raise responsibility taking with them, I will alienate them, and if I alienate them, I can no longer serve them. If I raise responsibility taking with them, they will see me as judgmental, paternalistic, and maybe even disloyal. Further, who am I to substitute my morality for theirs? While it may be true that there are examples like Toro where responsibility taking saves the client money, surely that is not the norm. If it were the norm, many more clients would take responsibility out of self-interest. The fact that clients so often choose to deny indicates that many expect that more is to be gained than lost financially by denying.<sup>73</sup> And if this is what the client wants—if what the client cares about is money—who am I to second guess him? It is not my job to be holier-than-thou and substitute my morals for the client's. I am there to serve the client, not to judge him. That is for the judge and jury."

In the ensuing section, I address the question of how to lessen the risk of client alienation when discussing responsibility taking, for, particularly if done poorly, the risk of client alienation is substantial. Let me first respond briefly to the charge that to discuss responsibility taking with clients is to impose the lawyer's morality upon the client. I do not suggest that a lawyer should substitute her moral values for her client's. The rules of legal ethics are clear, and in my view right, that it is for the client to determine the ultimate ends of legal representation, and that the lawyer who feels unable to abide by her client's ends should seek to resign.<sup>74</sup> Observe too that I have *not* argued here

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73. See *infra* section III.A.

74. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation. . . ."), 1.16(b)(4) (2003) ("[A] lawyer may withdraw from representing a client if . . . the client insists upon taking action . . . with which the lawyer has a fundamental disagreement. . . ."). Some may ask whether the lawyer's decision to seek to resign (I write "seek" as in adjudicatory matters withdrawal can require the leave of the court) should be more than a matter of personal preference but rather one of professional obligation. Suppose, for example, that after discussing responsibility taking with a client who the lawyer is convinced is at fault (e.g., because the client has admitted his fault to the lawyer), the civil client nevertheless insists on denial. Can the argument be made that the lawyer should be under a professional duty to withdraw (e.g., that the legal profession should not be complicit in



(though probably such arguments can be made) from what one might label the public or social perspective that the lawyer should discuss responsibility taking with the client so as to produce more just outcomes.<sup>75</sup> Nor do I dispute the claim (indeed in section III.A, I argue for the claim) that under our current legal system denial is often best for the injurer economically. Rather my argument is that lawyers should not *assume* that clients have solely economic interests. A default presumption should not be set focusing solely on the client's economic interests and ignoring the client's possible moral, psychological, relational, and spiritual interests. Indeed, no default presumption should be set at all. If it is for the client and not the lawyer to determine the ultimate ends of legal representation, then the lawyer must speak with the client and explore what those ends are. The lawyer must learn, rather than presume, the client's interests.

The description of legal counseling within Ethical Consideration 7-8 of the Model Code captures so well the approach envisioned here:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to a client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision

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wrongful denial) or otherwise modify her approach to legal representation? Such an argument would be antithetical, of course, to the traditional understanding of zealous advocacy, and such a rule, if adopted, could significantly impede lawyer-client communication. Yet perhaps the case can be made. For related discussions, see *ETHICAL STUDY*, *supra* note 7 (arguing the pursuit of justice should be the foundational goal of the legal profession); *SIMON*, *supra* note 7 (arguing the pursuit of justice should be the foundational goal of the legal profession).

Observe too that for the lawyer who believes her client is at fault, how she assists that client in denial in litigation while simultaneously complying with the rules of procedure is far from apparent.

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the [attorney's] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; . . . (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11(b).

75. For such approaches to legal ethics, see, for example, Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); KRONMAN, *supra* note 7.

whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.<sup>76</sup>

When it comes to responsibility taking, the first two sentences of the paragraph above are particularly telling. "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so." For most injurers, the decision of whether to take or deny responsibility is the most fundamental ethical choice they will make, or will have made for them, during litigation. It is laced with moral, psychological, relational, and economic considerations—considerations which can often point in different directions. If there are to be any areas where the lawyer helps the client think seriously about the implications of his decisions, surely this should be one of them.

#### D. Counseling Responsibility Taking

Often the lawyer either knows or suspects that her client is at fault for what occurred. In some cases, this occurs during the initial client interview. In other cases, the lawyer develops this sense over time based on what the client has said, what the client has not said, or information garnered from sources other than the client. Whatever the source, how is the lawyer to raise the question of responsibility taking without alienating the client?

Before answering the question, two preliminary comments to frame the discussion may be of help. First, I mentioned earlier by way of a hypothesized defense of denial the idea that some clients seek lawyers precisely because they want to deny harms they commit, and that both the lawyer and the client have the expectation that it is the lawyer's job to help the client deny. The more this is true, then of course the more difficult raising the question of responsibility taking with clients will become. In my opinion, however, this characterization is often inaccurate. Many clients come to lawyers because they have a problem, if not a crisis, with legal dimensions, and what they seek from their lawyers is help in handling the problem.<sup>77</sup> Many clients do not arrive with a rigidly predetermined approach to their problem in mind. Rather they seek professional help to handle something

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76. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1983).

77. Such a conception underlies, for example, Brandeis' "lawyer for the situation," see GEOFFREY C. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978), and subsequent views of lawyers as problem solvers. See ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

they cannot adequately handle on their own. Sometimes such help is purely "technical," as when a lawyer knows the correct terminology to use when drafting a will. Yet often the help is of a broader nature, including not only legal advocacy but counseling and advice.

Second, in my view, the willingness of many clients to think seriously about responsibility taking and discuss it with their lawyers depends significantly on the *lawyer's* willingness to "go there." The lawyer is the professional experienced in handling such matters, and most clients take cues from lawyers about what to discuss and what not to discuss. Consider by analogy what is for many among the hardest matters to discuss—death. In her pioneering work on caring for the terminally ill, Elisabeth Kübler-Ross found that whether patients would in fact talk with their medical professionals about death—a subject many patients wanted to discuss—depended significantly on the willingness of the medical professionals to talk with them about death. Where the professionals were comfortable talking about death, patients would discuss death with them. However, where the professionals were uncomfortable talking about death, patients would not.<sup>78</sup> A similar lesson applies to responsibility taking. The willingness of clients to talk about responsibility taking with their lawyers may depend significantly on the willingness of the lawyers to talk with them about it.

### 1. *Trust and Relationship, Not Magic Bullets*

For many lawyers, raising the subject of responsibility taking with clients is a "difficult" or intimidating conversation to initiate.<sup>79</sup> Few enjoy being the bearer of bad news.<sup>80</sup> The lawyer may fear that if she raises responsibility taking, the client will grow angry with her and view her as judgmental, paternalistic, and perhaps even disloyal. Is there an approach to such conversations that fully avoids such risks? No, there is no "magic bullet" for making the process of discussing responsibility taking with clients riskless and effortless.<sup>81</sup> Yet not discussing the issue with the client is often inadequate too. The basic choice of whether to take or deny responsibility should be the client's. To know, rather than presume, what the client wants, the lawyer must discuss it with the client. Further, the potential moral, psychological, and relational costs of failing to take responsibility are precisely the type of important considerations that a client might

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78. See ELISABETH KÜBLER-ROSS, *ON DEATH AND DYING* 244–68 (1969).

79. On approaching such conversations, see generally DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (1999).

80. Yet often lawyers must bear "bad news" and should learn to do so skillfully. For advice, see Linda F. Smith, *Medical Paradigms for Counseling: Giving Clients Bad News*, 4 CLINICAL L. REV. 391 (1998).

81. *Id.* at xvii.

overlook on his own, making the potential service to the client of raising the issue particularly valuable. Thus, from the viewpoint of client service, there are risks both to raising and to not raising responsibility taking with clients. Though not easy to have, if the lawyer wishes to best serve the client, such conversations are frequently necessary.

How then should the lawyer do this? Below I offer some general thoughts. Much, however, depends on the particular client, the particular lawyer, their particular relationship, and the particular case. There is no simple recipe for effective communication. Effective communication is highly context- and people-dependent. The general thoughts below are no substitute for the lawyer giving careful attention to the particularities of each case.

If there is one word that captures what is needed to make such conversations effective, it is *trust*. Raising the subject of responsibility taking involves drawing attention to a mistake or mistakes the injurer has made, which in turn may press upon the injurer's sense of shame. How will the injurer react to having his attention so focused? If the injurer distrusts the lawyer, he will probably react negatively. Likely he will hear the conversation as words of accusation and rebuke, and will grow angry at the messenger rather than facing the message. On the other hand, if the injurer trusts the lawyer, the chances are far greater that he will hear the words as ones of care and face the difficult matters implicated. At first, the lawyer's role may seem oppositional; however, at a deeper level the injurer may experience it as supportive. To use a rough parallel, it is easier to heed constructive criticism from a trusted friend than from a stranger.

The first questions the lawyer should thus pose are ones to herself. "Am I trustworthy? Have I acted toward this client in a manner such that he trusts me?" If the answers to such questions are "no," constructively discussing responsibility taking will be difficult. This challenge of being trustworthy is nontrivial for many lawyers. An important part of many lawyers' jobs is *not* telling the whole truth. In litigation, for example, to best serve their clients, lawyers commonly present half the truth.<sup>82</sup> Though they may not actively lie, they often must selectively omit and slant, with the hope of persuading the judge or jury to accept the version of the facts most favorable to their client. The adversarial trial system is designed this way. While being trustworthy in the jury's eyes is important to trial advocacy, being less than fully candid is also an important legal skill. In certain respects, lawyers are called upon to be fully trustworthy in some areas but not others. This is no simple task.

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82. Deception is common in legal negotiations as well. For a critique, see Gerald B. Wetlauffer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990).

Related to trust is the quality of the lawyer-client relationship generally. As mentioned, the more the client feels his lawyer cares about him, the more receptive he is likely to be to conversations of responsibility taking. As typified by the growth of the mega law firm, we live in an age when legal services have in significant ways become commodified. Lawyers jump from firm to firm and city to city. Relationships with clients are often short-lived. Constrained by the billable hour, conversations with clients are often brief. When stacks of documents are being sifted through in discovery, it may not matter exactly which lawyer does the sifting. But when it comes to raising the subject of responsibility taking, it does. The lawyer-client anonymity common in law practice today is antithetical to such conversations. Though I will not argue here the position that "once there was a time" when lawyers did speak with clients about responsibility taking—both for fear of romanticizing the legal past<sup>83</sup> and, more fundamentally, because I do not believe that sufficient data about past and current legal counseling exist to make such a comparison—I note the possibility that such counseling may have once occurred more than it now does.<sup>84</sup>

Before raising the subject of responsibility taking, it is important that the lawyer listen carefully to the client's story and demonstrate to the client that she understands his account. Not only will this help the client to feel that the lawyer is on his side, but it also helps encourage the client to listen to the lawyer. There has been much discussion in negotiation theory about the importance of demonstrating empathy (i.e., demonstrating to the other side that one understands what they are saying) so that they will in turn listen to what one has to say.<sup>85</sup> A similar dynamic occurs here. A client who feels heard will be more willing to listen.

## 2. *A Spectrum of Discourse: Confrontation, Indirection, and Engagement*

How then is the lawyer to raise the issue of responsibility taking with the client? As mentioned, I do not believe there is a single optimal approach. Rather, it is helpful to think of a range of approaches. One way to characterize that range is in terms of a "confrontation" spectrum. Below I discuss three points on this spectrum. I will call these confrontation (most confrontational), engagement (moderately

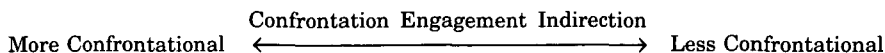
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83. For references, see Rhode, *supra* note 71, at 592-93 ("Bar literature has long hosted laments for some happier era when law was a profession, not a business, and lawyers were stewards of societal values, not servants of private profit.").

84. For one such view, see Paul J. Zwier & Ann B. Hamric, *The Ethics of Care and ReImagining the Lawyer/Client Relationship*, 22 J. CONTEMP. L. 383, 387 (1996).

85. See MNOOKIN ET AL., *supra* note 77, at 49.

confrontational), and indirection (least confrontational). Visually, one might image these as:



Two further notes. First, the word “confrontational” has different possible meanings. One can “confront an issue,” “confront a person,” or “confront a person about an issue.” The sense of “confrontational” intended here is the third—the lawyer confronting the client about responsibility taking. (It is hard to imagine many circumstances where the second sense confrontationalism—purely toward the person—is appropriate in the lawyer–client relationship.) Second, for expository purposes, I will discuss these three approaches in the following order: confrontation, indirection, and engagement. In so doing, I do not mean to imply the third approach of engagement is a golden mean between the other two. While I am fondest of that approach, I stress that I believe there is no single optimal approach appropriate in all circumstances. The need for context-sensitivity in making such determinations is paramount.

#### *a. Confrontation*

The clearest way to raise an issue with a client is to do so directly. “Let me be straight. From everything you’ve told me, it sounds like you were at fault here. In my judgment, you’ve got a basic choice to make. You can deny what you did or you can take responsibility for it. In my view, there are pros and cons to each which we can discuss if you like, but that, as I see it, is the basic issue you face.”<sup>86</sup>

To some lawyers such directness may seem the stuff of science fiction. To others it may not. Thomas Shaffer recalls an experience as a young lawyer in the early 1960s sitting in a partner’s office listening to the telephone conversation between the partner and a corporate client about whether the client was under a legal obligation to desegregate its factories. The laws were in the process of revision, and the partner walked the client through complex details of why, despite the revision, the client was not legally obligated to desegregate.

The [corporate secretary] said, at the end of all this, ‘Well, what do you think we ought to do?’ My senior in the practice of law said, ‘Oh, I don’t think there’s much doubt about what you ought to do: you ought to integrate those factories.’ The secretary said, ‘All right,’ and hung up his telephone [and the corporation proceeded to desegregate its factories].<sup>87</sup>

The approach of Dallas attorney John McShane is also very interesting. David Wexler writes that McShane,

86. Should the client insist on denial, the lawyer must then consider her response carefully. See *supra* note 74.

87. SHAFFER & COCHRAN, *supra* note 66, at 31.

has a substantial criminal law practice that 'focuses solely on rehabilitation and mitigation of punishment.' McShane is in private practice, and he can pick and choose his clients. He chooses only those who agree to use the crisis occasioned by the criminal case as an opportunity to turn their lives around.<sup>88</sup>

This might involve the client entering a drug treatment program, so that later evidence of "the client's well-documented recovery, rehabilitation and relapse prevention plan [can be] presented to the judge in mitigation of punishment."<sup>89</sup>

Neither the Shaffer or McShane examples are ones of pure confrontation. They are not "on all fours" with the hypothesized lawyer who bluntly confronts the client about responsibility taking. In the Shaffer case, the corporate secretary invites the lawyer's opinion. Further, the matters of legal and moral responsibility clearly differ. In McShane's practice, the responsibility-taking focus is not simply toward the crime, but also toward underlying substance abuse problems. Moreover, McShane describes his communication style as compassionate rather than brusque and judgmental.<sup>90</sup> Nevertheless, these examples are suggestive of some important lessons.

A first lesson is what one might call being "tough on the problem, but supportive of the person."<sup>91</sup> Squarely confronting a client about a difficult issue does not mean being disrespectful. Indeed, the more respectfully confrontation is handled, the more likely it is to be effective. Similar to a patient who wants his doctor to "tell it to me straight," many clients value blunt communication from their lawyers.<sup>92</sup> For some, the more direct the communication, the more respectful it is ultimately taken to be. The speaker's candor conveys that the speaker sees the listener as an adult who can hear "the truth" and make his own decision about it. In a way this is the opposite of the paternalist who couches what she says for fear of the listener's negative reaction.

A second lesson is not to be overly fearful of alienating the client. This is true not simply because the lawyer (like McShane) has the right to determine the style of her practice and whom to represent but, more deeply, because the essential goal of legal representation is serving the client's best interests rather than avoiding client alienation. Akin to calls for "radical honesty" in psychotherapeutic counseling,

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88. David B. Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders "Make Good,"* 38 CT. REV. 18, 19 (2001).

89. John V. McShane, *The Need for Healing: Addressing the Causes of Wrongdoing Helps the Client and Society*, 89 A.B.A. J. 59 (May 2003).

90. *Id.*

91. See, e.g., SHAFFER & COCHRAN, *supra* note 66, at 99; ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 17-39 (2d ed. 1991).

92. As Thomas Morgan writes, "The thought that a lawyer should give a client the kind of candid, tough advice which the lawyer would give a good friend may seem radical or unnatural. Any other approach, however, may be less natural." Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 459 (1990).

there is a serious argument to be made that by telling the client the truth the lawyer best serves the client, even if that means at times alienating the client.<sup>93</sup> What is essential is that the lawyer help the client, not that the lawyer be liked by the client. The lawyer who fears alienating the client should ask herself whether she does so with the client's best interests at heart (e.g., "The client needs legal help, and if I alienate him, he won't get that help.") or her own best interests at heart (e.g., "If I alienate the client, he'll drop me and I'll lose income.").

A third lesson is that the justification for the confrontational approach gains particular force when one thinks, as with the addiction issues McShane addresses, of the possibility of future repetition of wrongful conduct by the client. This applies not only to individuals but in the organizational context as well, where unaddressed problems can recur for decades (e.g., the American Catholic Church and pedophilia).

Finally, a confrontational approach need not be dramatic. One method, for example, is to raise the possibility of responsibility taking as one option in a matter-of-fact discussion of the menu of options the client faces. Rather than singling out responsibility taking for special treatment, approaching responsibility taking as a normal, possible option may help avoid anxiety in discussing that issue.

#### *b. Indirection*

At the opposite end of the spectrum from confrontation lies indirection. Here the lawyer's goal is not to raise the issue of responsibility taking herself but to send the client down a path along which the issue *might* get raised. Unlike direct confrontation, there is no guarantee the issue will get raised along such a path. Simultaneously, there is far less risk of client alienation.

Perhaps the most common indirect path is to bring the client to mediation. As part of working toward settlement, mediators, particularly evaluative ones,<sup>94</sup> often engage in "reality checking," that is, asking questions and presenting facts that are difficult for a party to face. Many lawyers bring their clients to mediation for precisely this reason.<sup>95</sup> They want the mediator to be the "bad guy" rather than having to be the "bad guy" themselves. Though reality checking is not identi-

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93. See, e.g., BRAD BLANTON, *RADICAL HONESTY: HOW TO TRANSFORM YOUR LIFE BY TELLING THE TRUTH* (1996).

94. For discussions of different styles of mediation, see Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

95. See, e.g., Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 429 (2002) (reflecting a sample where in a significant (forty-seven) percent of cases,



cal to raising responsibility taking, the two have much overlap. Note too that a central feature of mediation is to bring the parties face-to-face.<sup>96</sup> As discussed further in section III.B, the typical pattern of denial in litigation is characterized by compartmentalization—the communication between the parties is highly restricted and stylized, the handling of the disputed is delegated, history is reduced to facts relevant to proving legal fault at trial, and so on. When an injurer comes face-to-face with the person he injured, the injurer can no longer hide not only from the injured party, but also from aspects of himself, such as a sense of guilt or shame, that he might rather ignore. (This helps explain why emotional outbursts are not uncommon in mediation.) Further, as evidenced by the prevalence of apology within mediation, mediation often does lead to responsibility taking.

Sometimes even more oblique means can be helpful. “Perhaps you might want to take a few weeks to think things over?” “What does your spouse think about this?” “When you look back at this years from now, what do you want say about it all?” “Have you prayed about this?” Such questions too may help move the client from narrow compartmentalization and short-run, shame-avoidant myopia to a place where the client can be in touch with a fuller range of long-run interests, including moral, psychological, and relational interests. (We sometimes use the word “wise” to describe the lawyer who can help clients shift from a narrow focus to a broader one.) Perhaps the lawyer can suggest other persons (with their permission, of course) who have been in similar situations in the past with whom the client might talk. Perhaps something as minor as the lawyer having photos of her family in her law office can impart to the client the idea that what takes place within law is not ultimately separate from what takes place in life. Of course, there is no guarantee that such indirection will lead the client to address the question of responsibility taking, but sometimes it may.

### c. *Engagement*

Somewhere between direct confrontation and oblique indirection lies engagement. The idea here is to try to raise the issue of responsi-

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the desire to provide a “needed reality check” for their own clients was a factor prompting lawyers to choose mediation).

96. Though sometimes face-to-face contact between the parties is broken during mediation (e.g., as when a mediator caucuses privately with one side), and while not all mediations do involve face-to-face contact of the parties (e.g., as in “online” mediations of e-commerce disputes or with mediations conducted with only the parties’ lawyers attending), face-to-face contact between the parties remains a defining feature of most mediation. Additionally, the non-verbal communication present in face-to-face meetings generally helps promote trust among the parties. See Janice Nadler, *Rapport in Legal Negotiation: How Small Talk Can Facilitate E-mail Dealmaking*, 9 HARV. NEGOT. L. REV. 223, 228–29 (2004).

bility taking by, to the degree necessary for the client to make his legal choices, "going through" the client's experience.

The first, indispensable step is listening. As mentioned, in part this is a matter of trust. To be willing to listen to their lawyers, most clients must first feel heard. But there is more than just trust at stake. Powerful emotions like guilt, shame, and anger often attach to injuring others. Until those emotions are at some level recognized and processed, the ability of the client to think clearly about denial and responsibility taking may be greatly impaired.

To provide effective legal counsel, often the lawyer must listen for not just the "facts" alone, but the client's *experience* of those facts. "Tell me about it from the start." "How did you feel when that happened?" "How are you feeling about it today?" Though some may find the overall approach advanced in this Article quite judgmental,<sup>97</sup> the nonjudgmental, Rogerian roots of client-centered counseling are very much what I have in mind.<sup>98</sup> First, the lawyer listens nonjudgmentally to the client's experience. Occasionally, this may happen during the first meeting, but typically it will take longer for a sufficient level of trust to be established for the client to feel comfortable sharing such feelings. As Bastress and Harbaugh write, "[C]onfrontation—unless it relates to clarification of factual inconsistencies—should not ordinarily be used in the early stages of the lawyer–client relationship. The typically threatening nature of confrontation can damage and stunt an undeveloped relationship."<sup>99</sup>

After the client has discussed his experience, the client's choice of whether to take or deny responsibility can then be broached. "I'd like to talk with you next week<sup>100</sup> about some different possible paths we might take, and hear where you want to go with this. Is there any part of what occurred for which you feel responsible, and if so, would you be willing to pay something for that? Would you rather we litigate this? Maybe we can talk about some of the different options."

Some may ask whether such an approach invites the lawyer to "practice psychology without a license." In my view, the answer is no. The goal here is for the lawyer to provide the client with a full range of legal services. For legal counseling on such matters to be effective, addressing the client's emotions to a certain degree is often important, if not essential. I would caution, however, that it is critical for a lawyer to know the limits of her professional role and skills, and to refer

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97. While the approach advocated here does call for some moral assessment of the client's acts, the need for that assessment is rooted ultimately in client service.

98. See BINDER & PRICE, *supra* note 67, at 14–15; BASTRESS & HARBAUGH, *supra* note 51, at 32.

99. BASTRESS & HARBAUGH, *supra* note 51, at 281.

100. I write "next week," as time can be essential in helping clients address such matters.

clients to other professionals, like psychologists, when appropriate.<sup>101</sup> Injurers, especially those who do so intentionally, often also need psychological counseling. The lawyer should not seek to provide such counseling. However, the lawyer must be sensitive to the role psychological and emotional issues can play in the client's legal choice-making.<sup>102</sup> A similar point would apply, for example, to religious counseling. The lawyer need not work through with the client the ramifications of taking or denying responsibility in terms of the client's religious belief system. The client should go to his clergy for that. That, however, does not mean the lawyer should simply ignore the possibility that the case has religious dimensions for the client.

Let me make three further comments about these different approaches. First, these approaches, especially engagement and confrontation, require a moderate degree of emotional competency by the lawyer.<sup>103</sup> The lawyer needs to be comfortable with the client discussing or otherwise expressing feelings like shame, guilt, and anger. Not all lawyers possess such counseling skills, and even those who do must be sensitive to cultural barriers.<sup>104</sup> Second, clients will differ in their capacities and desires to discuss such emotions. For some, statements such as, "I felt horrible when I realized I had . . ." come easily. For others, they come not at all. Lawyers should be sensitive to such variety. Third, under any of these approaches, the lawyer's goal should not be "salvational"—to turn the client into a moral being and persuade the client to make the moral choice.<sup>105</sup> But neither should the lawyer assume the worst about the client's morals. The goal rather is similar to that of much moral counseling: to have a conversation that assists the client by helping him understand the possible ramifications, including moral ramifications, of his choices.<sup>106</sup> The choices are

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101. Recall that the implicit classification of the client's problems as legal rather than, say, psychological, is done by the client when he seeks legal counsel. The client may of course be in error. See Walter O. Weyrauch, *Foreword: Legal Counseling as an Intellectual Discipline*, 42 FLA. L. REV. 429, 432 (1990).

102. See generally PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al. eds., 2000).

103. See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (1997); Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCH. PUB. POL'Y & L. 1173 (1999).

104. As Michelle Jacobs writes, "Though, legal educators appear to assume counseling skills are innate, clinicians would agree that in fact they are difficult to learn and effectively employ." Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 412 (1997); see also Carolyn C. Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133, 162 (2004).

105. See Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 566 (1991).

106. On the merits of such moral counseling, see generally Robert M. Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97

fundamentally the client's. The lawyer's essential role remains that of service.

### 3. *A Skeptical View and an Optimistic Response*

Upon hearing my central claims—that, morally speaking, injurers ought to take responsibility of their own initiative and that, from the viewpoint of client service, their lawyers ought to consider discussing this possibility with them—some will react with skepticism. “If men were angels,” a skeptic might say, “there would be no need for law. Many clients and many lawyers are greedy. Whether consciously or not, they will place their own financial interests before some claim of what is right for them to do. Further, people who injure others are likely to be low on the ‘responsibility taking’ scale to begin with. If they were sensitive toward others, they would have been less likely to have committed the injury in the first place.<sup>107</sup> Your vision is idealistic, but not realistic.”

There is much force to the skeptic's view, and I suspect that in many cases the skeptic will be descriptively right. (Indeed, the discussion of economic incentives in section III.A. begins with the skeptic's premise.) Yet the possibility for change should not be disregarded either. As discussed above, injurers have moral, psychological, and relational interests as well as economic interests. Such noneconomic interests give even self-interested injurers reasons to think seriously about responsibility taking. The possibility that responsibility taking will turn out to be economically beneficial should also not be discounted. Indeed, even if their lawyers fail to raise responsibility taking with them, such reasons may lead some injurers to consider the topic seriously.

Injury often offers the injurer a character-building opportunity. For the injurer who would deny out of greed, it may be the chance to place morality before money. For the injurer who would deny out of shame, it may be the chance to accept one's human imperfection. So too lawyers who discuss responsibility taking with clients may find a deepened sense of meaning in law practice, a meaning derived from providing a fuller range of service to the client, and, simultaneously, from being a member of a profession that fosters moral behavior, so-

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(1985); SHAFFER & COCHRAN, *supra* note 66. Cf. HAZARD, *supra* note 77, at 147 (“A legal adviser should be reticent about incorporating morals or policy into his advice. . . .”). For a history of scholarship concerning the related topic of “moral activism” by lawyers, see Paul R. Tremblay, *Moral Activism Manque*, 44 S. TEX. L. REV. 127, 137–47 (2002).

107. Though obviously true in cases of intentional injuries, even in negligence cases, a greater sensitivity toward others may lead to increased caution, which may decrease the chances of injury.

cial healing, and just outcomes.<sup>108</sup> The public perception of lawyers may also improve, for little causes greater loss of public respect for the legal profession than the view that lawyers help the guilty-in-fact go free. For those lawyers who would fear losing business, recall the advice of attorney Abraham Lincoln: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser. . . . As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."<sup>109</sup> Even if denial is the norm, the hope exists that individual clients and individual lawyers will choose another path.<sup>110</sup>

Finally, and it is here that I place my greatest hope, is the chance that, as individual clients and individual lawyers choose a different path, the norms within our legal culture will shift. I suspect that many injurers deny and many lawyers fail to discuss with them the possibility of responsibility taking because "that is the way it is done." Without reflection, they simply slip into the common mode of response.<sup>111</sup> Yet as discussions of responsibility taking become more widespread, the modality that once seemed inevitable may no longer seem inevitable. The experience over the past two decades with medical error may be instructive. In 1987, when the Lexington VA switched from the denial approach to the responsibility approach after medical error, it was viewed as bizarre. Roughly two decades later numerous medical providers have adopted this approach,<sup>112</sup> and discussions of apology in the medical context are becoming increasing common.<sup>113</sup> Innovative laws are being passed both requiring the disclosure of serious medical errors and even excluding apologies made after medical errors from admissibility into evidence.<sup>114</sup> Minor fissures can sometimes tumble a wall that once appeared rock solid.

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108. See generally STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (1999) (discussing lawyers who found satisfaction through transforming their legal practices); HOWARD GARDNER ET AL., *GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET* (2001) (emphasizing the importance of ethical pursuits to job satisfaction generally).

109. Abraham Lincoln, *Lecture Notes*, in 2 *COLLECTED WORKS OF ABRAHAM LINCOLN* 81, 81 (Roy P. Basler ed., 1953).

110. See REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* (1932).

111. See Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 69 n.22 (1980) (quoting G.K. Chesterton, *The Twelve Men*, in *TREMENDOUS TRIFLES* 57-58 (1955)) ("[T]he horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.").

112. See Zimmerman, *supra* note 27.

113. See, e.g., Douglas N. Frenkel & Carol B. Liebman, *Editorial: Words that Heal*, 140 *ANNALS OF INTERNAL MED.* 482 (2004); Mattera, *supra* note 27.

114. See *Toward Candor*, *supra* note 30.

### III. SOME STRUCTURAL FACTORS

To this point, I have addressed the denial found in ordinary lawsuits from the viewpoints of the individual client and the individual lawyer. In this Part, I switch to a structural or systemic lens. My goal here is to explore several broader factors that may buttress the practice of denial in ordinary civil disputes. The areas considered are economic incentives, dispute resolution mechanisms, legal education, and cultural composition, including rights-based ideology and social denials of structural injustices. As noted at the outset, I do not attempt a definitive treatment of these areas but seek to advance some basic questions and hypotheses about the linkage between denial and these areas. I also offer a few ideas toward possible reform. Fully evaluating these questions, hypotheses, and reform ideas must await another day.

#### A. Economic Incentives

Earlier I raised, by way of objection to the idea that injurers would be led (e.g., by moral reasons) to take responsibility of their own initiative, the skeptic's view that economic forces alone drive the decisions of many injurers. Some may argue, "Many injurers care only about themselves, more specifically, their money." Indeed, some may argue that corporate defendants, including insurance companies defending those they insure against third-party claims, *should* only concern themselves about profits.<sup>115</sup> "Lawyers can talk with clients about the moral, psychological, relational, and spiritual benefits of responsibility taking until they are blue in the face, but if the economic incentives point the other way, clients will not do it."

One can try to challenge the premise that for those injurers solely concerned with their wealth, denial is always the most strategically efficacious path. Further, one can dispute the claim that corporations have no obligations beyond profit maximization.<sup>116</sup> Nevertheless, the

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115. See, e.g., Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32 (discussing business generally).

116. Exploring this issue fully is beyond my scope here; however, let me briefly outline the structure of possible discourse. Those opposing corporate moral responsibility might stress the legal, rather than natural, personhood of corporations, and highlight corporate fiduciary obligations to shareholders. On such fiduciary obligations, see Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55 (John W. Pratt & Richard J. Zeckhauser eds., 1985). Those advocating moral responsibility by corporations may try to "pierce the corporate veil" and argue that legal constructions or fictions should not erase basic moral responsibility (e.g., why should not a corporation have a duty to make amends for its missteps?). In the case of third-party insurance, they may argue that even if, *arguendo*, the insurance company is not under a moral obligation to take responsibility, the insured injurer *is* under such a moral obligation (e.g., the injurer cannot erase his basic moral duty to take

skeptic's challenge is a very serious one. Under our existing system, the strategy of denial is often sensible from the economic viewpoint. An injurer may reason: "If I accept responsibility I will have to pay. But if I deny responsibility, there is a chance I can get away with it. Putting aside for the moment legal fees, denial is like a no-lose gamble. If the gamble fails, I'll just be made to pay what I would if I took responsibility, but if the gamble succeeds, I'll pay nothing." Once legal fees are factored in, the calculation is pretty similar. "If what I expect to save by denying (i.e., the probability the court will make the wrong decision multiplied by the damages) exceeds the expected increase in legal fees due to extended legal proceedings, then denial still makes sense."

The flaw in the current system is really quite simple. If the only punishment for taking a cookie from the cookie jar is to return the cookie *if* you're caught, there is little disincentive to stealing. Similarly, if the only punishment for denying is to pay what you would pay if you voluntarily accepted responsibility, there is little disincentive to denying.

To illustrate the skeptic's logic more formally, I present below a basic economic model of decision-making under uncertainty concerning the injurer's choice of whether to admit or deny responsibility.<sup>117</sup> The model's essential point is implicit in the skeptic's comment. Roughly put, awarding compensatory damages at trial encourages, rather than discourages, denial. This model is, of course, a simplification of reality. Nevertheless, it may help us understand some basic dimensions of the injurer's choice, as well as some of the tradeoffs involved in creating economic incentives that encourage, rather than discourage, responsibility taking.

One advantage of a formal model is to make clear one's assumptions, even though those assumptions may be in part unrealistic.<sup>118</sup>

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responsibility by *ex ante* having purchased liability insurance). Compare, e.g., PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984), and Robert Ashford, *The Socio-Economic Foundation of Corporate Law and Corporate Social Responsibility*, 76 TUL. L. REV. 1187, 1191 (2002) (both arguing for corporate moral responsibility), with Martin Benjamin & Daniel A. Bronstein, *Moral and Criminal Responsibility and Corporate Persons*, in *CORPORATIONS AND SOCIETY* 277 (Warren J. Samuels & Arthur S. Miller eds., 1987) (arguing against corporate moral responsibility). Note that insurance companies owe those they insure a duty of good faith and fair dealing in responding to third-party claims. See *INSURANCE BAD FAITH LITIGATION* § 3.01 (Matthew Bender 2000); DENIS J. WALL, *LITIGATION AND PREVENTION OF INSURER BAD FAITH* §3.01 (2d ed. 1994).

117. See generally HOWARD RAIFFA, *DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY* (1968).

118. See Milton Friedman, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 15 (1953) (defending the use of unrealistic assumptions). Critiques of Friedman's approach are many. See Amartya Sen, *Description as Choice*, in *CHOICE, WELFARE AND MEASUREMENT* 432, 435-41 (1982). For further

In the model below, I begin with the following assumptions:<sup>119</sup> (1) the injurer cares only about the economic consequences of his choices and attaches no value to the morality or immorality of denial; (2) the injurer is risk neutral, indifferent between the expected value of a gamble and a sum certain in that amount; (3) the injurer knows with complete accuracy whether he is guilty-in-fact or innocent-in-fact;<sup>120</sup> (4) should trial result, the court will not be completely accurate in determining guilt and innocence, but will make the wrong decision with a known error rate; (5) should liability be found, the damages awarded will be ordinary compensatory damages; and (6) unlike most economic models of settlements,<sup>121</sup> settlement can be reached at only one amount, namely, the level of compensatory damages.

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discussion and references, see Jeanne L. Schroeder, *Just So Stories: Posnerian Methodology*, 22 CARDOZO L. REV. 351 (2001).

119. Later I shall relax assumptions (5) and (6).

120. One might think of injurers who either instinctively know this or can confidently determine it after brief discussion with their lawyers.

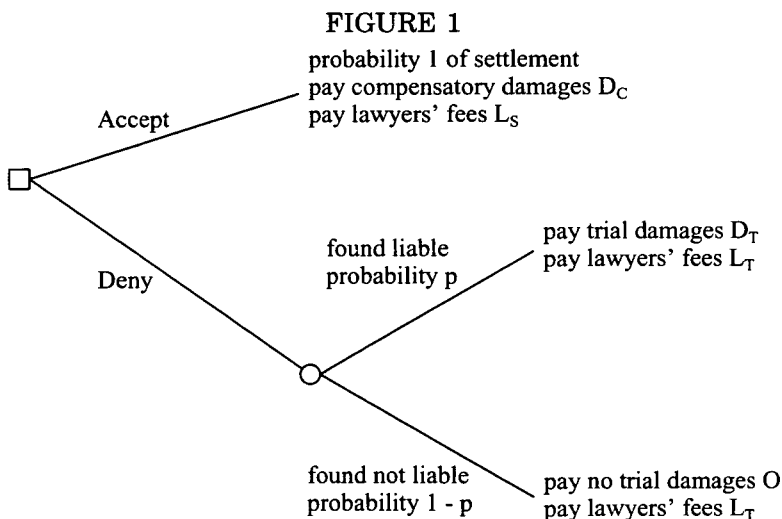
121. There is rich literature on the economic analysis of settlement versus trial. For an overview, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 567–77 (6th ed. 2003). The theoretical starting point for that literature is that settlement bargaining takes place within the shadow of trial, and that, assuming, *inter alia*, that the parties have a similar (probabilistic) expectation about what will happen at trial, they should settle out of court around the level of that expectation rather than incurring the litigation costs associated with going to trial. Under such a view, trials, rather than settlements, are to be viewed as aberrant, which corresponds well to empirical data reflecting that the vast majority of cases are settled rather than tried. *Id.* at 567 (“[O]ne study found that only two percent of automobile accident claims are actually tried, another that only four percent of all civil cases in state courts are tried.”) (citations omitted); see also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. tbl. 1 (forthcoming Nov. 2004), available at <http://www.abanet.org/litigation/vanishingtrial/vanishingtrial.pdf> (last visited Aug. 5, 2005) (indicating the from 1962 to 2002 the percentage of civil cases disposed of by trial fell from 11.5% to 1.8%).

A basic premise of most economic models in this vein is the *not-unrealistic* assumption that the settlement value is flexible. See, e.g., John P. Gould, *The Economics of Legal Conflict*, 2 J. LEGAL STUD. 279 (1973); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). See generally Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067 (1989) (surveying that literature). By contrast, in order to highlight the basic moral choice of responsibility taking versus denial, the model above assumes the settlement can only be struck at the level of compensatory damages. One might imagine, for example, a “stubborn” or “proud” injured party who, knowing he has been wrongfully injured, would rather take the case to trial than accept a settlement lower than compensatory damages, even if he knows the expected value of trial is less than compensatory damages. Later I shall discuss relaxing this assumption. See *infra* note 134.



### Case I. The Guilty Defendant

Let us begin with the case of the injurer who knows he is in fact guilty that he has committed an injury in violation of some law.<sup>122</sup> The basic choice the injurer faces is to either take responsibility for what he has done or to deny it. If he takes responsibility, let us assume that he and the injured party will quickly strike a fair settlement at the level of compensatory damages (" $D_C$ "). Let us assume too that the injurer will also have to pay some (low amount) of legal fees (" $L_S$ ") in reaching that settlement. If instead the injurer denies responsibility, a trial will ensue. Let  $p$  be the probability the injurer will be found liable at trial. Thus,  $1 - p$  is the error rate of the trial process, namely the probability that despite being guilty-in-fact the injurer will be found not liable at trial.<sup>123</sup> Let  $D_T$  be the damages that will be awarded at trial if the injurer is found liable. Let  $L_T$  be the total legal fees the injurer will incur by taking the case through trial, and let the trial costs (" $TC$ ") be the difference between  $L_T$  and  $L_S$ , that is, the trial costs equal the extra legal costs the injurer will incur by trying rather than settling the case ( $TC = L_T - L_S$ ). Visually, the injurer's choice may be represented as follows:



122. In this section, although I use the terms "guilty" and "innocent," the context is still that of civil rather than criminal law.

123. The error rate of the trial process means simply the frequency with which trial outcomes differ from defendants' actual guilt- or innocence-in-fact. This does not necessarily mean that procedures were not followed properly at trial. For example, suppose the defendant is guilty-in-fact, but the plaintiff lacks sufficient evidence to prove it. Even if the court properly applies its own procedures and finds the defendant not liable, it has still erred in a very basic sense.

In such a situation, the injurer will choose to accept responsibility ("Accept") and settle the case if and only if the expected value of his payment from accepting responsibility ["EV(Accept)"] is less than or equal to the expected value of denying ["EV(Deny)"], that is  $EV(\text{Accept}) \leq EV(\text{Deny})$ .<sup>124</sup>

$$EV(\text{Accept}) = (1)(D_C) + L_S = D_C + L_S$$

$$EV(\text{Deny}) = \underbrace{[p(D_T) + (1 - p)(0)]}_{\substack{\text{outcome if} \\ \text{found liable}}} + \underbrace{L_T}_{\substack{\text{outcome if} \\ \text{found not liable}}} = pD_T + L_T$$

Hence, the injurer will accept responsibility if and only if

$$D_C + L_S \leq pD_T + L_T$$

or

$$D_C \leq pD_T + TC \quad (\text{for } TC = L_T - L_S).$$

Now let us suppose further that, if liability is found at trial, the injurer will pay ordinary compensatory damages, so that  $D_T = D_C$ . Now, the injurer will accept responsibility if and only if

$$D_C \leq pD_C + TC$$

or

$$1 - p \leq \frac{TC}{D_C}.$$

Hence, where the same damages would be awarded through settlement and trial, the injurer will accept responsibility and settle if and only if the error rate  $(1 - p)$  is less than the ratio of the trial expenses to the damages. Conversely, if the error rate exceeds the ratio of trial expenses to damages, the injurer will deny.

Intuitively this suggests that where the damage award will be the same through settlement or trial, an injurer will only accept responsibility if his legal fees for going to trial (TC) outweigh the expected savings from trial error. In other words, if the damages at trial are (only) compensatory damages, the sole incentive the risk-neutral injurer has to take responsibility and settle comes from decreased legal fees. Two further observations are in order. First, the higher the error rate at trial, the more likely the injurer is to deny, gambling that at trial he will mistakenly be found not liable. Conversely, the more accurate the trial process, the more likely the injurer will be to take responsibility. Second, *ceteris paribus*, as the ratio of trial costs to damages decreases, the incentive to deny increases. In the extreme, as that ratio approaches zero, the injurer will always deny responsibility if there is some positive probability of trial error.

124. Though I use " $\leq$ " for simplicity, technically the injurer is indifferent in the case of strict equality.

Observe that these results are driven in significant part by setting the level of damages at trial ( $D_T$ ) equal to compensatory damages ( $D_C$ ). If accepting responsibility and settling the case results in compensatory damages, and losing the case at trial will also result in compensatory damages, there is little incentive for an injurer to take responsibility rather than playing the no-lose gamble (except for increased litigation costs) of taking the case to trial and possibly being found not liable.

### Case II. The Falsely-Accused Defendant

With an eye toward the later discussion of using damage multipliers to "incentivize" the guilty injurer to accept responsibility, let us consider too the case of the falsely-accused defendant who knows he is in fact innocent. As with the preceding case, let us assume this defendant cares only about the economic consequences of his choice to either accept or deny responsibility, and places no value on the indignity or immorality of a making false confession. Let  $p$  again be the probability the defendant will be found liable. Thus,  $p$ , rather than  $1 - p$ , now represents the error rate of the trial process, and  $1 - p$  represents the accuracy of the trial process.

Mathematically, the choice is identical to that of the guilty defendant in Case I, and an identical calculus applies. Hence, the falsely-accused defendant will (falsely) "accept responsibility" if and only if  $EV(\text{Accept}) \leq EV(\text{Deny})$ , or, as derived above,  $D_C \leq pD_T + TC$ .

Let us assume again that, as is usual, compensatory damages are awarded at trial, so  $D_T = D_C$ .<sup>125</sup> As above, the defendant will (falsely) accept responsibility if and only if

$$1 - p \leq \frac{TC}{D_C}.$$

As  $1 - p$  now represents the accuracy of the trial process, this suggests that the falsely-accused defendant will only (falsely) accept responsibility if the trial process is less accurate in probabilistic terms than the ratio of trial expenses to damages.

### B. Toward Creating Economic Incentives Against Denial

As discussed above, under our current rules, the injurer who knows he is in fact guilty has relatively little incentive to accept responsibility. More specifically, it was presented that he would accept responsibility if and only if  $D_C \leq pD_T + TC$ , (if paying compensatory damages in a settlement would be less than the expected value of damages awarded at trial plus increased legal fees associated with go-

125. It might be imagined that, though the defendant was not at fault for the accident, the damages to the plaintiff caused by the accident can be readily established, making  $D_C$  a well-defined number.

ing to trial). Under the usual legal standard where trial damages are set at compensatory damages, the incentive is essentially against settlement, for settlement would only occur if the error rate ( $1 - p$ ) is less than the ratio of trial costs to compensatory damages ( $TC/D_C$ ). The usual measure of damages within our civil legal system, compensatory damages, creates an economic incentive to deny rather than take responsibility.<sup>126</sup> One might think that wise public policy, by contrast, would seek to align external incentives with moral behavior. For example, by punishing theft, we create an incentive to do what is moral, namely, not steal. The question thus arises of what might be done to induce defendants who know they are guilty-in-fact to take responsibility without coercing defendants who know they are innocent-in-fact to falsely accept responsibility.

The first and no doubt best approach for a well-functioning legal system is to reduce the error rate at trial. Consider the basic case where trial damages are set at compensatory damages. As derived above, both the injurer who knows he is guilty-in-fact and the falsely-accused defendant will accept responsibility if and only if

$$1 - p \leq \frac{TC}{D_C}.$$

Note, however, that for the injurer who knows he is guilty-in-fact,  $1 - p$  is the error rate of trial, whereas for the falsely-accused defendant,  $p$  is the error rate at trial. Hence, the more accurate the trial process (the lower  $1 - p$  is for the guilty defendant and the higher  $1 - p$  is for the innocent defendant), the more likely it is that defendants who know they are guilty will admit their guilt, and defendants who know they are innocent will maintain their innocence.

A second approach is to adjust trial costs. One might, similar to the British system, shift legal fees onto the loser at trial.<sup>127</sup> One might also consider simply raising or lowering trial costs. Observe, however, that raising or lowering trial costs per se does not solve the problems of denial by guilty defendants and false confessions by innocent ones. For example, raising trial costs may induce more true confessions by guilty defendants but may also induce more false confessions by innocent ones, as both will accept responsibility if and only if  $1 - p \leq (TC/D_C)$ .

126. A contrast might be drawn here to mandatory sentence reductions within the criminal law for defendants who proactively accept responsibility, but not for defendants who proclaim responsibility only after having put the government to its burden of proof at trial. See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 3E1.1 (Nov. 2001).

127. There is comprehensive literature analyzing such fee-shifting rules (e.g., the British rule, FED. R. CIV. P. 68, etc.) from an economic perspective. See *Symposium on Fee Shifting*, 71 CHI.-KENT L. REV. 415 (1995).

A third approach is to consider using damage multipliers to penalize denial.<sup>128</sup> Recall that the basic economic force motivating an injurer's denial under our current system is that, in many respects, denial is a no-lose gamble. Suppose the injurer knows he is guilty. By accepting responsibility he *will* have to pay compensatory damages, but by denying his guilt he will only pay compensatory damages *if* he is found liable. Thus, the decision to deny becomes the logical one. But what if damages at trial were not simple compensatory damages but some larger amount, such as a multiplier of compensatory damages.<sup>129</sup> Now, the decision to deny would no longer be a riskless, costless one. But at what level should such a multiplier be set? While a damage multiplier may properly induce defendants who know they are in fact guilty to admit their guilt, it may also create a greater incentive for falsely-accused defendants who know they are in fact innocent to accept responsibility, lest a wrongful judgment be made at trial resulting in an unbearable award.<sup>130</sup>

As mentioned, one might hope that a well-designed trial process would induce defendants who know they are guilty-in-fact to accept responsibility and settle privately, but would not induce falsely-accused defendants to do so. What level of damage multiplier might do this? For analytical simplicity, consider first the following case. Suppose that compensatory damages greatly exceed trial costs, i.e.,  $D_C \gg TC$ , or, in the alternative, that trial costs equal zero. Suppose further that if liability is found at trial, trial damages  $D_T$  will be set at some multiple ( $m$ ) of compensatory damages, so that  $D_T = mD_C$ .

Recall that both the guilty-in-fact defendant and the falsely-accused defendant will accept responsibility if and only if

$$D_C \leq pD_T + TC.$$

As by assumption (1)  $D_C \gg TC$  or  $TC = 0$  and (2)  $D_T = mD_C$ , this means he will accept responsibility if and only if

$$D_C \leq p(m)D_C$$

128. The approach here follows Bentham's use of multipliers to compensate for the probabilistic detection of crime. See Jeremy Bentham, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 365, 402 (John Browning ed., 1962) (1843) ("As there are always some chances of escape, it is necessary to increase the value of the punishment, to counterbalance these chances of impunity."). For references to recent scholarship, see Richard Craswell, *Damage Multipliers in Market Relationships*, 25 J. LEGAL STUD. 463 (1996).

129. See, e.g., A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887 (1998) ("[I]f a defendant can sometimes escape liability for the harm for which he is responsible, the proper magnitude of damages is the harm the defendant has caused, multiplied by a factor reflecting the probability of his escaping liability."); Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185 (1999).

130. One response to this problem is to consider specific deterrents to false accusations. Note, however, that an analogous problem would arise with such deterrents, i.e., the risk of stifling valid claims.

or

$$m \geq \frac{1}{p}$$

Recall that for the guilty-in-fact defendant  $1 - p$  represents the error rate, while for the falsely-accused defendant  $p$  represents the error rate. Hence, the innocent-in-fact defendant will accept responsibility if and only if

$$m \geq \frac{1}{\text{error rate}},$$

while the guilty-in-fact defendant will accept responsibility if and only if

$$m \geq \frac{1}{1 - \text{error rate}} \quad (\text{for as error rate} = 1 - p, p = 1 - \text{error rate}).$$

Accordingly, if one wants a system where the guilty-in-fact defendant will accept responsibility but the falsely-accused defendant will maintain his innocence, the damage multiplier  $m$  should be set such that

$$\frac{1}{1 - \text{error rate}} < m < \frac{1}{\text{error rate}}.$$

For example, if the error rate is 20%,  $m$  should be between 1.25 and 5; 30%, between 1.43 and 3.33; and 40%, between 1.67 and 2.50.<sup>131</sup> In general, the multiplier should be set between the inverse of one minus the error rate and the inverse of the error rate. Note that, by definition, the error rate cannot exceed 1, and one would hope and expect that the error rate would be less than 0.50, otherwise the court system could do better by simply flipping a coin. This suggests using a multiplier of 2 in general, as for any error rate greater than 0 but less than 0.50 (i.e.,  $0 < \text{error rate} < .5$ ), using a multiplier  $m$  of 2 will satisfy the condition

$$\frac{1}{1 - \text{error rate}} < m < \frac{1}{\text{error rate}}.$$

Now, let us consider an example also involving trial costs. Suppose  $D_C = 10$ ,  $L_S = 1$ ,  $L_T = 3$  (so  $TC = L_T - L_S = 2$ ),<sup>132</sup> and the error rate is 25%. For simplicity, consider whole number multipliers. Consider first the defendant who is in fact guilty:<sup>133</sup>

131. Such figures are roughly in keeping with the common punitive damage multiplier of 3.

132. One might imagine that these are in units of \$100,000, so  $D_C = \$1,000,000$ ,  $L_S = \$100,000$ .

133. Recall these are amounts he must pay.

If  $m = 1$ , he will deny, for  $EV(\text{Accept}) = 10 + 1 = 11$   
 $EV(\text{Deny}) = .75(1)(10) + 2 = 9.5$

If  $m = 2$ , he will admit, for  $EV(\text{Accept}) = 10 + 1 = 11$   
 $EV(\text{Deny}) = .75(2)(10) + 2 = 17$

If  $m = 3$  or above, he will accept. . . .

Consider second the falsely-accused defendant:

If  $m = 1$ , he will deny, for  $EV(\text{Accept}) = 10 + 1 = 11$   
 $EV(\text{Deny}) = .25(1)(10) + 2 = 4.5$

If  $m = 2$ , he will deny, for  $EV(\text{Accept}) = 10 + 1 = 11$   
 $EV(\text{Deny}) = .25(2)(10) + 2 = 7$

If  $m = 3$ , he will deny, for  $EV(\text{Accept}) = 10 + 1 = 11$   
 $EV(\text{Deny}) = .25(3)(10) + 2 = 9.5$

If  $m = 4$ , he will admit, for  $EV(\text{Accept}) = 10 + 1 = 11$   
 $EV(\text{Deny}) = .25(4)(10) + 2 = 12$

If  $m = 5$  or above, he will accept. . . .

Here it would be sound to use a damage multiplier of either 2 or 3, but not 1 (too low) or 4 or above (too high). If the multiplier is 2 or 3, then the guilty-in-fact defendant will want to accept responsibility, while the innocent-in-fact defendant will maintain his innocence. If the multiplier were only 1, the former would not occur; while if the multiplier were 4 or above, the latter would not occur.

Let me make several further notes. I intend the models above to be only suggestive, to provide an analytic exposition that identifies some of the basic choice dynamics. The model assumes that actual guilt or innocence is known perfectly by the defendant in advance, that the probability of error at trial is established and known, that only monetary factors matter to the defendant, that the settlement value is not flexible,<sup>134</sup> and so forth. Reality is far more complex than such simpli-

134. In order to illustrate aspects of the injurer's basic moral choice of whether to take or deny responsibility, the model made the fairly unrealistic assumption that settlement could only occur at the level of compensatory damages. *See supra* note 120. But what would happen if this assumption were relaxed and the parties were able to adjust the settlement level (e.g., suppose the injured party was no longer "stubborn" or "proud" but would accept a settlement offer less than the level of compensatory damages)? For brevity, I will not present a formal model here, but will instead offer a few general remarks.

Returning to the basic insight that parties with similar expectations about trial would choose settlement around the level of the expected value of trial rather than incurring the litigation costs, one would now expect the parties to settle around expected value of trial. It is of course possible parties with similar expectations would not settle. *See generally* BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow et. al. eds., 1995); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994). Consider the case where the parties know the injurer is guilty-

fying assumptions, and a model built upon such assumptions should be kept in appropriate perspective.

The essential lessons, however, may still be of significance. Our society's typical approach of awarding ordinary compensatory damages at trial is a recipe for denial, not responsibility taking. When coupled with the fact that courts make errors, this damages standard creates a significant economic incentive for the injurer to deny.<sup>135</sup> No doubt the best way to fix this is to improve the accuracy of the trial process. Yet so long as courts continue to make errors—and some level of adjudicative error seems inevitable—under the ordinary standard of compensatory damages a strong economic incentive to deny will remain. In response, our society might think about measures to penalize the act of denial, such as damage multipliers. Although establishing an adjudicative error ratio will not be simple, theoretically speaking, we might adopt a damage multiplier lying between the inverse of the error rate and the inverse of one minus the error rate. Even the use of a small multiplier (e.g., 1.5) may be enough to change some behavior, sending the message, both symbolic and real, that denial will be punished. It is one thing to say if you are caught stealing a cookie from the cookie jar you must put it back. It is very different to say that if you are caught stealing a cookie you must put one and one half cookies back. Small changes in marginal incentives can sometimes produce dramatic changes in behavior. Finally, I do *not* mean to suggest that multipliers are a panacea for this problem. Even if care is taken so that such multipliers are not so great that they induce innocent defendants to plead falsely, in those cases of judicial error where innocent-in-fact defendants plead innocent but are nevertheless

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in-fact but also know there is a chance the injurer would be found not liable at trial. One would anticipate settlement to occur around the expected value of the trial, namely,  $(1 - \text{error rate})(D_C)$ . Put differently, where the settlement value is *flexible*, the injured party's compensation will be a fraction of ordinary compensatory damages reduced by the probability of error at trial. One might call this reduction, i.e.,  $(\text{error rate})(D_C)$ , a "denial premium."

Let me make two further observations. First, from the *moral* viewpoint, the appropriate settlement level where the injurer knows he is at fault is the level of compensatory damages,  $D_C$ . By contrast, settlements discounted by the probability of error at trial can hardly be called praiseworthy. Though they do save the parties litigation costs, they (a) do not fully compensate the injured party and (b) reflect at root a modified form of passive accountability rather than internally-chosen responsibility by the injurer. Second, damage multipliers may again be worth consideration. Where settlement values are flexible, damage multipliers may help to reduce or eliminate this "denial premium" by increasing the expected value at trial to the level of compensatory damages. Multipliers, in other words, change the probabilistic endowments against which bargaining in the shadow of trial takes place. I would note, however, that this is also true in the case of the falsely-accused defendant.

135. Or, if settlement values are flexible, to subsequently settle at a level less than compensatory damages. See *supra* note 134.



found liable, using a damage multiplier creates more unjust results.<sup>136</sup> Above, I have sketched some of the most basic economic features of the injurer's choice to deny, and tried to suggest some possible responses, including damage multipliers. Fully evaluating the pros and cons of such multipliers is well beyond my task here.<sup>137</sup>

### C. Dispute Resolution Mechanisms

It is not surprising that an injurer's choice of whether to take or deny responsibility can be influenced by the type of mechanism (e.g., litigation, mediation, etc.) through which the dispute is processed. Such influence relates to different mechanisms' very purposes and manners of functioning. I cannot fully explore this linkage between dispute resolution mechanism type and the injurer's choice of taking or denying responsibility here. However, let me make a few basic observations about it, particularly with regard to litigation.

Above I have been critical of the denial-promoting properties of our litigation system. It must be remembered, however, that the essential function of litigation is not promoting private responsibility taking but enforcing a measure of accountability upon those who will not take responsibility of their own volition and, simultaneously, achieving some compensation for the injured. Litigation is the backup if agreement cannot be reached elsewhere, more particularly, if the injurer will not take responsibility of his own initiative.

Litigation should not, however, be the place where dispute resolution typically begins. The rules of evidence themselves imply this, encouraging private settlement by excluding from admissibility statements made in settlement negotiations and, via the exception for state privileges, in mediation.<sup>138</sup> The issue is not simply one of wasted resources, delay, or the possibility of error at trial, but of morality. Morally speaking, the approach where the injurer voluntarily accepts responsibility of his own initiative and the parties reach a mutually-acceptable settlement is better than when the injurer is held accountable in court.<sup>139</sup>

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136. From a social perspective, a higher multiplier is more likely to induce guilty-in-fact defendants to accept responsibility of their own initiative; however, innocent-in-fact defendants who deny guilt but are wrongfully found liable will pay a higher price.

137. For example, multipliers are more likely to induce false confessions among risk-averse innocent defendants than among risk-neutral innocent defendants. Multipliers also implicate what one might call the injurer's dignity interest in not being forced to confess against himself.

138. See FED. R. EVID. 408, 501.

139. See *Immorality*, *supra* note 2, at section III.A; see also Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995). Cf. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

Are there particular features of litigation that promote the injurer's choice to deny? Conversely, are there aspects to other dispute resolution approaches that help promote responsibility taking? While much of the discussion above focused on economic incentives within litigation, I also mentioned that litigation is characterized by "compartmentalization"—the injurer "hands over" the dispute to a lawyer; dialogue is restricted and stylized; there is a narrow focus on legal fault; and so on. Here, I would like to expand briefly on two particular pieces of such compartmentalization. These are (1) the "distancing" of the injurer from the injury, in particular through the avoidance of face-to-face contact between the injured and the injurer, and (2) the formal absence of people with close prior connections, like family and friends, to the injurer. Please note, I offer these remarks by way of observation, not criticism, of the litigation process.<sup>140</sup>

Often injurers hire lawyers, in particular litigators, with the goal of "letting the lawyer take care of it." As mentioned, one of the first messages an injurer receives from his lawyer is to cease communicating with the injured party, and, when necessary, to let the lawyer communicate on his behalf. The lawyer and the litigation process become a shield from direct contact with the injured. Positively framed, this may help the injurer gain peace of mind by putting the dispute "out of mind" or at least decreasing the attention he gives to it. The mechanism, in other words, helps distance the injurer from the dispute. Critical to this is the avoidance of face-to-face contact with the injured. As mentioned, wrongful injury typically generates feelings of guilt and/or shame within the injurer. By avoiding contact with the injured, the injurer can often—temporarily at least—avoid contact with those internal feelings. Yet it is precisely those internal feelings that so often drive the impulse to take responsibility. Hence, through separating the injurer from the injured, the mechanism helps to foster the injurer's denial. Conversely, mechanisms such as mediation which promote face-to-face contact between the injurer and the injured are likely to put injurers in touch with those internal feelings. As mentioned, when an injurer comes face-to-face with the person he injured, he can no longer hide not only from the injured party, but also from aspects of himself (e.g., his sense of guilt or shame) that he might rather ignore. A powerful example of this comes from victim-offender reconciliation programs in the criminal setting. Injurers, including those already incarcerated, often report that meeting with their victims is quite difficult.<sup>141</sup>

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140. For example, justification may exist for separating injured and injurer in terms of violence prevention, emotional safety of injured, etc.

141. See Robert B. Coates & John Gehm, *An Empirical Assessment*, in *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY* 251, 256 (Martin Wright & Burt Galaway eds., 1989); see also *48 Hours: My Daughter's Killer*

The formal absence of people with close prior connections to the injurer, such as family and friends, is another important feature of litigation supporting the denial. Put differently, litigation (and many other common forms of dispute resolution) is in large part conducted by strangers to the underlying dispute. Though the roots of the Anglo-American system stem from a time when, interestingly enough, jurors were often required to come from the neighborhood where the facts giving rise to the dispute occurred<sup>142</sup> (and might thus have prior knowledge of the parties or dispute), under the current system such prior contact would provide an almost automatic grounds for the peremptory challenge of a juror or the recusal of a judge. Motivated by impartiality, we want judges and juries who are strangers to the parties, and metaphorically envision justice as a blindfolded woman holding impartial scales. Further, Charles Fried's analogy notwithstanding, one's lawyer is not typically a close friend, but a hired professional.<sup>143</sup> Family and friends of the injurer may of course attend a trial, either for support or as witnesses, but their presence is essentially happenstance. There is no formal role across cases for persons close to the injurer.

An interesting contrast is found in the Navajo "circling" approach to disputes.<sup>144</sup> Though the professionals may still be strangers, "[e]very person concerned with or affected by the dispute or problem receives notice of a gathering to talk things out[,] a gathering where "[t]he parties *and their relatives* come together in a relaxed atmosphere to resolve the dispute."<sup>145</sup> People in close relationships with the parties are formally invited to participate, and the expectation is that the injurer will accept responsibility within this process. Consider too the statement the Navajo use, both within and outside such circles, to rebuke a wrongdoer: "You act as if you had no relatives."<sup>146</sup>

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(CBS television broadcast, Feb. 4, 1999) (showing imprisoned murderer awaiting execution who described meeting mother of victim in the context of a victim offender mediation program as the hardest thing he had done in his life).

142. See WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 134 (1971).

143. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060 (1976). For a critique, see Edward A. Dauer & Arthur Allen Leff, *Correspondence*, 86 YALE L.J. 573 (1977).

144. See James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983); see also Raymond D. Austin, *ADR and the Navajo Peacemaker Court*, JUDGES J., Spring 1993, at 8. See generally Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993); Robert Yazzie, "Life Comes from It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994); Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297 (2000).

145. Yazzie, *supra* note 144, at 182-83 (emphasis added).

146. Austin, *supra* note 144, at 10.

Though I will not explore it here, it is noteworthy that the Navajo circling approach arises against a different culture backdrop, a culture rooted in respect and responsibilities toward others as well as clan and kinship relations,<sup>147</sup> and one must be cautious, of course, not to presume this approach can be readily adopted by non-Navajo cultures.<sup>148</sup> Rather I wish to use this approach as a means of contrast with ordinary litigation. In ordinary litigation, shame—and here I mean not the internal feeling of shame but the experience of external shame—is generally delayed and in some ways muted.<sup>149</sup> Shame is delayed in that it is largely (though not exclusively) experienced after the verdict is reached. Shame is muted in that such an announcement is made by strangers often in front of strangers. Under the Navajo process, shame usually touches the injurer earlier as friends and family prepare for the upcoming circle. Shame also has a stronger quality, for one's friends and family are present at the circle. The presence of parents, spouses, neighbors, siblings, and so on helps transform the injurer from an atomistic person without responsibilities toward others into a relational person (e.g., a child, spouse, neighbor, or sibling, respectively) with responsibilities. In litigation, one sometimes feels the impulse to "shake" the injurer and ask, "Didn't your parents teach you anything?" or, "What would your mother say if she knew this?" The circle inherently does such shaking through the presence of family members. Just as it is harder to hide from morality when one confronts the injured face-to-face, it is also harder usually to hide from morality when one is surrounded by one's family. The process is conscience-evoking rather than conscience-avoiding.

A second and related aspect of having family and friends present is support. As discussed, facing one's errors, especially those that have injured others, is a difficult process for most. Though some prefer to walk that road alone, many benefit from the help of family and friends. "Even though you have done something wrong, we still care about you," is the message conveyed. The presence of family and friends thus functions like a double-edged sword against denial: piercing the injurer's ability to avoid his moral debt and simultaneously enhancing his ability to pay that debt.

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147. On culture's influence on responsibility taking, see *infra* section III.D.

148. See generally Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003 (1997).

149. See generally BRAITHWAITE, *supra* note 5; Thomas J. Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 97 (1998); ELIZA AHMED ET AL., SHAME MANAGEMENT THROUGH REINTEGRATION (Alfred Blumstein & David Farrington eds., 2001).

#### D. Legal Education

Educational processes typically have multiple aims. Some of these aims are articulated. Some—often the most important—are not. One of legal education's most basic unarticulated goals may be preparing students to be complicit in denial. This is a function of readying students for their subsequent careers. Legal employers hire lawyers to help their clients win cases. The best product in the legal employment market is the lawyer who can skillfully argue for either side, and it is that product most law schools seek to produce. The most hireable are those willing, at least at times, simply to be "hired guns." It is of course easiest if the lawyer's sympathies generally align with the client's position, as when a left-leaning lawyer works as a public defender. However, even left-leaning public defenders must sometimes, if not most of the time, represent clients who are guilty-in-fact. A pedagogical key to legal education is preparing students to advocate for clients whose positions they believe or strongly suspect to be unjust.

Students commonly enter law school with the hope of serving clients who are in the right. To the extent they think of such matters (and often they do not), they imagine themselves like Atticus Finch, defending the wrongfully accused, or Erin Brockovich, seeking redress for the wrongfully injured. Their heroes are lawyers whose clients are in the right, so that by fighting for their clients they are simultaneously fighting for justice. Yet by the time they leave law school, students will have been trained to represent either party, to function as lawyers both for the side whose cause they believe just and for the side whose cause they believe unjust.<sup>150</sup> In particular, students will be ready to assist injurers in denying harms they know they have committed. This conversion is no mean feat. As denial after injuring another is a fundamental act of moral regression, assisting an injurer in denial raises serious issues of complicity. How is this conversion accomplished? How do law schools teach students to be readily complicit in denial? Consider three factors: (1) training in subordinating moral sensibilities and feelings to technical argumentation; (2) training in the ideology of winning; and (3) training against facing one's own errors openly and squarely.

##### 1. *Subordinating Moral Sensibilities and Feelings to Technical Argumentation*

Lawyers who assist injurers in denying responsibility must either rationalize their role (e.g., give a systemic defense of the ethics of zealous advocacy) or, as is more common, simply detach from their moral sensibilities. The process of teaching students to detach from their

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150. For a polemic to the contrary, see Duncan Kennedy, *The Responsibility of Lawyers for the Justice of Their Causes*, 18 TEX. TECH L. REV. 1157 (1987).

moral sensibilities usually begins at the start of law school.<sup>151</sup> Most can recall a first-semester staple such as the gruesome lifeboat case *Regina v. Dudley and Stephens*,<sup>152</sup> which rejected a “necessity” defense to murder and cannibalism when faced with the prospect of starvation at sea, or the cold-hearted contracts case *Mills v. Wyman*,<sup>153</sup> finding a father’s after-the-fact promise to pay a Good Samaritan who had cared for his son through illness and eventual death unenforceable for lack of consideration (“past consideration is no consideration”). The usual justification for teaching such cases is, to use Holmes’ phrase, to help students avoid, “confusion between legal and moral ideas,”<sup>154</sup> that is, to follow law’s logic even in morally-problematic settings.<sup>155</sup> On the surface this goal appears sound, for lawyers must at times apply law to difficult settings. Yet such cases impart a subtler message too—*put one’s feelings aside*.<sup>156</sup> The unarticulated lesson is that we the lawyers simply go forward in a thick-skinned

151. For critiques, see THOMAS L. SHAFFER, *Moral Moments in Law School*, in ON BEING A CHRISTIAN AND LAWYER, *supra* note 60, at 165, 165–76; Walter H. Bennett, Jr., *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U. L. REV. 45 (1986); James R. Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. LEGAL EDUC. 11 (1982); Steven Hartwell, *Moral Growth or Moral Angst? A Clinical Approach*, 11 CLINICAL L. REV. (forthcoming 2004); David A.J. Richards, *Moral Theory, The Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359 (1981–82). Cf. Thomas E. Willging & Thomas G. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306, 358 (1981–82) (“Our data [supports the view] that the concerns of students for justice and humaneness are neither nurtured nor impeded by the process of legal education.”).

152. 14 Q.B.D. 273 (1884).

153. 20 Mass. (3 Pick.) 207 (1825).

154. Oliver Wendell Holmes, Jr., *The Path of the Law*, Address at Dedication of New Hall at Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 459 (1897).

155. Consider Thomas Shaffer’s description of Karl Llewellyn’s teaching:

Llewellyn told [entering University of Chicago law] students that they were welcome to their morals but that their morals had little to do with the culture of lawyers. ‘The hardest job of the first year,’ he said, ‘is to top off your common sense, to know your ethics into temporary anesthesia. Your view of social policy, your sense of justice – to know these out of you along with woozy thinking.’

SHAFFER, *supra* note 60, at 165 (quoting Llewellyn).

156. Such cases also impart a message of social detachment. As Peter Gabel writes:

The use of the *Mills v. Wyman* case in the first-year law school curriculum demonstrates that [legal education] involves an unconscious indoctrination of students into a set of values that define community members as strangers existing at ‘arm’s length’ who are not bound to each other if their respective self-interests—understood only in the material sense—are not served. . . . In place of an empathic expression of social concern, students learn that the correct legal response is a detached, unfeeling, analytical mode of rule application.

Peter Gabel, *Spirituality and Law*, 18 TIKKUN 2, 38 (2003). For a detailed analysis of this case, see Geoffrey R. Watson, *In the Tribunal of Conscience: Mills v. Wyman Reconsidered*, 71 TUL. L. REV. 1749 (1997).

manner without attending to our feelings. When such cases are taught, not typically discussed in the classroom are internal emotional matters like how it feels to read about murder and cannibalism, or how it feels to learn of the illness and death of a 25-year-old (the approximate age of most law students), the Good Samaritan's care, and the father's selfishness. If the only point to such cases were to teach legal doctrine, less gruesome and poignant cases could have been selected. Similar to medical students cutting into their first cadavers, ultimately the pedagogy is about both the subject and what it means to be a professional in such fields. Were it not there already, cases like these insert a wedge between the student's head and the student's heart.

The lesson of emotional detachment, however, is too important to be relegated to a first-year case or two. Rather, it is honed day after day through the supremacy given to *technical argumentation* in classroom discussion. By technical argumentation, I mean learning to argue and reason within the legally-relevant universe of rules and precedent. "I do not care how you feel," says the professor, "what matters is what legal argument you can make." Under this view legal analysis is at root an objective, mental, and logical process of thought and not a subjective, personal, and erratic process of feeling.<sup>157</sup> Precision and precedent are emphasized; inner feelings are discounted.<sup>158</sup> Further, though the law is of course meant to apply to real human situations, aside from a possible upper-level elective clinical course, actual human clients are not encountered. Rather, students read abstract descriptions of facts, both in hypotheticals and, as is more common, from case law. Note too that, despite the fact that few lawyers work at the appellate level, the cases read in textbooks come mostly from the cerebral, detached world of appellate case law. The paragon of legal understanding is an opinion rendered by a detached appellate judge who lacks any personal knowledge of the parties or the dispute. A basic lesson, then, is that being a lawyer involves detachment from one's feelings, including one's feelings about the merits of a case.<sup>159</sup> The problem is that justice and injustice are in many ways matters of

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157. As Christopher C. Langdell wrote when introducing his pioneering casebook, "Law, considered as a science consists of certain principles and doctrines. To have such a mastery of these as to be able to apply them with constant facility to the ever-tangled skein of human affairs, is what constitutes a true lawyer . . ." CHRISTOPHER C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* VI (1871).

158. For a critique, see David R. Culp, *Law School: A Mortuary for Poets and Moral Reason*, 16 CAMPBELL L. REV. 61 (1994). On the importance of emotions to the law generally, see *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999).

159. This separation of intellect and emotion ties to the use of the Socratic method discussed below. See Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 124 (1968) ("I want to reemphasize the fact that the Socratic Method exaggerates, and in a

feeling and not simply of thought. They are in part things one feels in one's gut. By teaching students to detach from their feelings, we simultaneously teach them to disregard their feelings of justice and injustice.

As with the other pedagogical matters discussed below, there is of course a logic to existing law school pedagogy. This logic is rooted in the vision of the lawyer as advocate. A rough statement of this view is as follows: "In the courtroom, it is the legal arguments one can make, rather than appeals to sympathy, that a judge will entertain, so to train students to be effective lawyers, we must train them to make those legal arguments, which will sometimes require them to disregard their feelings."<sup>160</sup> The problem, however, is that effective lawyering involves more than just advocacy. Parallel to the prior discussion of the advocacy bias in legal representation, legal education too suffers from an advocacy bias. The basic mistake is letting the one admittedly-important goal of training law students to be effective advocates drive the entire educational process. Lawyers must function not only as advocates but also as counselors and negotiators. Lessons such as emotional detachment which can be essential to one role can be antithetical to another.

## 2. *Training in the Ideology of Winning*

Detachment in place, the next lesson of law school is the ideology of winning. Nowhere is this better represented than in moot court competitions where victorious teams are those best able to argue both sides of the case.<sup>161</sup> The formal expression of this ideology usually comes through teaching about "zealous advocacy" in an upper level professional responsibility course. But such is icing on the cake. In contrast to many fields of instruction, legal classrooms consistently emphasize skill in debate. The great lawyer can make night seem like day and day like night. It is simply a matter of which cause she has been hired to champion. The game is debate, and the goal is to win. One's view of the merits of the case is irrelevant.

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sense, distorts the importance of intellect . . . [when it] leads to an ablation of emotional awareness . . .").

160. Judges and juries are not motivated solely by legal logic, and effective advocacy may sometimes involve subtly appealing to *sub rosa* factors. See generally Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405 (2000).

161. The sentiments of the British Barrister Cross are similar:

[I]t is sometimes more fun to have a bad case than a good one for it tests your powers of persuasion more severely. Certainly I have seldom felt better pleased than when I persuaded three out of five law Lords [i.e., the court] to come to a decision which I was convinced was wrong . . .

Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979) (first alteration in original) (quoting Rt. Hon. Lord Cross of Chelsea). Under such an approach, law essentially becomes a game or sport.



Now I do not suggest that teaching students to understand and articulate both sides of an argument should have no place in legal education. A skilled advocate and counselor must anticipate the other side's position. Nor do I suggest that training for adversarialism is without ethical defense. Many accept the "systemic" defense of zealous advocacy that, like blades of a scissors cutting, it is through each side having advocates zealously argue their case that truth and justice are found, and the sharper the blades, the more precise the cutting.<sup>162</sup> Rather it is my impression that many students give little thought to either the theoretical defenses of zealous advocacy or the criticisms of it. It is not that most students believe justice will be best served through zealous advocacy, but simply that zealous advocacy is what they are being trained to do and that for which they will be hired.

### 3. *A Note on Lawyer Psychological Dysfunction*

Both here and elsewhere I have argued for paying greater attention to a case's underlying merits from the perspective of the client—that clients who deny injuries they have caused may face serious spiritual, relational, and psychological risks. A few words may also be in order about the risks to lawyers of being complicit in such denial. I will not treat this subject in depth. Let me simply suggest a few basic ideas.

It is well-documented that levels of psychological distress and dysfunction rise markedly among students over the course of law school, and further that such levels remain very high among practicing lawyers.<sup>163</sup> Though there are undoubtedly many causes for this, complicity in wrongful denial, as well as complicity in unwarranted accusation, may play an important role. To see some basic aspects of this, consider a simple hypothetical.

Suppose a student John arrives at law school wanting to be like Atticus Finch, more specifically, to represent only clients with just claims and defenses. However by the end of law school, he is transformed into a hireable gun who will zealously represent any cause irrespective of the underlying merits. Suppose further that John has become what one might call an unreflective hireable gun who derives pleasure only from victory and the money that flows from it rather

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162. FREEDMAN, *supra* note 7, at 3–4.

163. See Susan S. Daicoff, *Lawyer and Law Student Distress*, in LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES 113–39 (2004); Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School*, and *Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 114–15 (2002); see also Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999) (discussing the unhappiness and poor health that characterizes the legal profession).

than from, as Monroe Freedman might, a sophisticated justification of his role in a larger system. What are the implications of this transformation for John's psyche?

First and foremost, John has learned to "tune out" his own sense of conscience. This is a tremendous diminishment of what it means to be a human being. Further, in the long run, it is likely to be quite damaging to John's mental health. One's conscience does not simply disappear when disregarded, even if it is repressed to the subconscious. Erecting a mental barrier between oneself and one's moral sensibilities is a very risky path. A related aspect of John's psychological vulnerability is that John has learned to disregard the intrinsic for the extrinsic.<sup>164</sup> Pursuing justice is largely an intrinsic goal, i.e., a goal that a person, upon reflection, has deep reasons to care about. It is likely to be a psychologically-robust goal: whether one achieves it or not, one will feel validated by the attempt. Seeking victory over another, by contrast, is a largely extrinsic goal. Success is by definition relative (one only succeeds if another loses), success is typically delayed (one cannot "succeed" until a verdict is rendered), and success is often erratic (if trial lawyers can only be happy when they win, then half are destined to be unhappy at any given moment). Though one might accept it intuitively, the view that people who pursue extrinsic goals are at far greater levels of psychological risk than those who pursue intrinsic goals is also confirmed by empirical research.<sup>165</sup> The "ethics" of winning are in many ways a formula for a lawyer's ultimate psychological collapse.

#### 4. *Training Against Facing One's Errors Openly and Squarely*

Teaching students to superordinate technical argumentation to personal feelings and to accept the ideology of zealous advocacy are relatively overt functions of legal education. I wish now to focus on a third, largely *sub rosa* aspect of legal education that contributes to the lawyer's ready complicity in denial: shame in error. Make no mistake, though this pedagogical lesson is largely unarticulated, its effects may too be profound.

Responsibility taking involves facing the shame of one's mistakes, and to counsel clients effectively about responsibility taking lawyers must be able to "go there" themselves; they must be comfortable facing human error and the shame that can attach to it. Yet often the training of law school is precisely the opposite, it is a training in the inability to openly face errors and the shame that can attach to them.

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164. See generally Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261 (2004).

165. For references, see *id.* at 263-64.

One of the most distinctive features of legal education is its pervasive "Socratic" method, and one of the distinctive features of the Socratic method is the possibility of public humiliation. Benignly viewed, under the Socratic method, expert professors pose simple questions designed to help students recognize the contradictions within their own arguments. Yet such conversations take place in large classrooms, often with a hundred or so spectators. Students, by definition inexperienced in the materials, are questioned publicly by expert professors. Though very few professors seek to humiliate students, the risk and sometimes experience of public humiliation is quite real,<sup>166</sup> and students learn to project competency, whether felt or not. Further, a deep message is imparted: *What's the basic approach to errors? Not to make them.* Errors, it is implicitly taught, bring a shame and humiliation that is to be avoided.

It is no surprise then that students so trained should have difficulty talking with clients about responsibility taking. Their law school experience is built in part around using shame as an incentive against making errors. Many students graduate not simply unprepared but negatively prepared to help others face error and shame compassionately. Experience, not rhetoric, is ultimately the greater teacher. The attitudes toward error students experience in the law school classroom are what they in turn apply in practice.

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166. See Watson, *supra* note 159, at 119–22 (describing the Socratic method as an "invasion pos[ing] a grave threat" to students); see also Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971). Though the demographic composition of both law students and professors has changed markedly since Watson's observations nearly four decades ago, discussions of the possibility of student humiliation through the Socratic method, as well as calls to avoid such humiliation, continue to this day. See, e.g., Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize*, 7 S. CAL. REV. L. & WOMEN'S STUD. 37, 40–43 (1997); Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 770–72 (2004). Of particular note are feminist critiques of the Socratic process. See, e.g., *Symposium on Civic and Legal Education: Panel One: Legal Education, Feminist Values, and Gender Bias*, 45 STAN. L. REV. 1525 (1993); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 45–51 (1994); Rosato, *supra*. Law schools are not, of course, the only educational institutions which mistakenly "use" the risk of public humiliation in an effort to promote learning. The practice often begins much earlier in the educational process. See, e.g., John Holt, *How Teachers Make Children Hate Reading*, in THE NORTON READER: AN ANTHOLOGY OF EXPOSITORY PROSE 189, 191 (Arthur M. Eastman et al. eds., 3th ed. 1977) ("From the very beginning of school we make books and reading a constant source of possible failure and public humiliation [by making children] read aloud, before the teacher and other children . . .").

### 5. *Toward Reform*

Having criticized our existing pedagogy, let me make some positive suggestions. I do not think there is one simple remedy for the issues discussed above. Though the basic goal of training lawyers to function effectively in the multiple roles they must play is clear, the means toward that goal are likely multifaceted. Professional responsibility courses might emphasize the value of legal services beyond simply winning, and teach means, such as journal writing, for fostering self-awareness. Legal counseling courses might be offered or required earlier in the curriculum to impart the subtleties of that craft. Steps might be taken to ensure that legal classrooms are safe and supportive places to make mistakes, rather than risky and humiliating ones.<sup>167</sup> This need not involve dropping all Socratic teaching, but rather paying careful attention to the tone and manner in which it is conducted. The essential question is whether one creates an atmosphere of respect and support or of power and shame.<sup>168</sup> No sacrifice to intellectual rigor need be done to achieve the former. In short, the imprint of the advocacy bias with legal education should be addressed and the educational process retooled to adequately prepare students for the varied tasks lawyers perform.<sup>169</sup>

### E. Cultural Composition

Above I have argued that denial has become a legitimated, normalized response to injury within our culture. Yet not all societies func-

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167. See Bastress, *supra* note 106, at 137–38.

168. Of related interest are the effects of stress which can both motivate and (if excessive) inhibit legal learning. For references, see Daicoff, *supra* note 163, at 118–19; Richard Sheehy & John J. Horan, *Effects of Stress Inoculation Training for 1st-Year Law Students*, 11 INT. J. STRESS MGMT. 41 (2004).

169. Law schools may also wish to reconsider the standards by which students are admitted. Although law school admissions processes do typically require personal statements and letters of recommendation, the foundation of admissions remains the technical measures of college GPAs and LSAT scores. For example, at the University of Florida where I teach, for years half of the entering class has been “presumptively” admitted based upon these two measures. From the viewpoint of lawyer complicity in denial, this is significant, for neither GPAs nor LSATs measures important factors relevant to the counseling of responsibility taking, such as the applicant’s interpersonal skills or commitment to justice. Indeed, given the extent to which the practice of law requires interpersonal skills and given that the legal profession’s most basic articulated goal is the pursuit of justice, the general absence of formal, systematized consideration of such factors is quite astonishing. If we are to be serious about producing lawyers who will discuss responsibility taking with clients—and, even more importantly, devote themselves to the pursuit of justice generally—law schools should reconsider their admissions standards. This may require increased efforts to provide more textured assessment of candidates (e.g., through interviews, evaluation of past work history, and community service, etc.), but the reward may well be worth the price.

tion in this manner. In Japan, the strong expectation is that people who commit injuries will apologize.<sup>170</sup> With the Navajo, as mentioned, there is a far greater moral focus on relationships and responsibilities, and, simultaneously, an expectation that those who harm others must make repair.<sup>171</sup> One thinks too of the abundance of lawyers in America by international standards.<sup>172</sup> Accordingly, the question arises—why has denial become a normal, legitimated mode of response to injury within *our* society?<sup>173</sup> Are there broader cultural factors that help to reinforce it?

Let me state clearly that I cannot fully address these questions here. As much fine research in legal anthropology reflects, there is little doubt that manners of dispute processing within a society are related to broader cultural factors (so such questions are worth exploring), and there is little doubt that such relationships are often complex (so such questions are not simple to answer).<sup>174</sup> In the discussion below, I do not mean to suggest that American culture is the only culture where legally-legitimated denial occurs, nor do I assert any view on the degree to which the factors discussed below are essential roots of the type of denial we see in our culture. (Previously I have discussed factors like shame avoidance, greed, and economic incentives within litigation as important contributors to the denial we see.) Yet the question remains to be asked about the influence of broader, cultural factors on the practice of denial in ordinary legal disputes. In response, let me consider two such factors. First is our culture's rights-based moral focus and related beliefs about the accuracy of our courts. Second is our history of what one might call "macroscopic" denial, that

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170. See generally Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC. REV. 461 (1986).

171. Yazzie, *supra* note 144, at 189.

172. Precise international comparison of this is difficult, as, among other things, the licensing of lawyers varies significantly among countries. See Ray August, *The Mythical Kingdom of Lawyers: America Doesn't Have 70 Percent of the Earth's Lawyers*, A.B.A. J., Sept. 1992, at 72. However, "[i]nformed estimates," writes Deborah Rhode, "put the [percentage of the world's lawyers found in the United States] somewhere between one quarter and one third[.]" Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 991 (1998) (citing Marc Galanter, *Pick a Number, Any Number*, Legal Times, Feb. 17, 1992, at 26).

173. For references to comparative international studies, see Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1, 3 n.6 (1994). Kagan argues that American culture is characterized by a high level of "adversarial legalism" and views lawyers as a contributor, but by no means the only contributor, to this. See *id.* at 60. For a similar theme in a linguistic vein, see DEBORAH TANNEN, *THE ARGUMENT CULTURE* (1998) (critiquing the dominance of legalistic debate within American discourse generally).

174. See, e.g., *The Disputing Process—LAW IN TEN SOCIETIES* (Laura Nader & Harry F. Todd Jr. eds., 1978); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983).

is, committing mass injuries like conquest and slavery for which compensation has essentially never been made. Again, I offer these topics by way of question, investigation, and hypothesis. Full consideration must await another day.

In our culture, the subject of morality is often framed in terms of rights (what a person has the right to do) rather than in terms of responsibilities (what moral duties a person owes to others).<sup>175</sup> Taking responsibility after injury is by contrast definitionally and paradigmatically a matter of responsibility. Further, the ultimate locus of rights is the courtroom. "If you can prove in court that I violated a right of yours, then I will pay. Otherwise, I owe you nothing." Morality is in large part reduced to what can be proven at law. Though askew, the moral "logic" runs as follows: "I only owe you a moral debt if you can prove in court I owe you a legal debt." Denial thus becomes a legitimate response to injury. Despite the many fine arguments that have been advanced suggesting we pay more attention to responsibilities (Why, after all, must rights and responsibilities be in competition? Cannot we respect both?), my sense is that our culture remains highly rights-oriented, frequently to the exclusion of attention to responsibilities. If so, one topic for further research is to what extent our cultural rights-orientation supports, and is supported by, the practice of denial we see in ordinary legal disputes.

Also of interest may be research concerning the influence of trials on denial. Trials are processes in which denial is expected and to some degree legitimated. It is accepted that parties within trials will deny accusations. The widespread use of trials may thus be seen as both a response to the social legitimization of denial and also as a contributor to it. We may not know which came first, the chicken of the social reliance on trials or the egg of the social legitimization of denial, but they may well go hand in hand.

Related to this is the subject of the public belief in the accuracy of trials, for the "logic" that one only owes a moral debt if it can be shown in court that one owes a legal debt rests on the belief that courts produce just results. Though in theory the social goal of holding wrongdoers to account through trials and the private moral claim upon an injurer to take responsibility need not be at cross-purposes, the belief in the justness of the former may in part undermine the social demand for the latter. The more confident society is that trials produce accountability, the less it may press for private responsibility taking.

Please do not mistake my words above. I am not asserting a view one way or another about whether our trials actually produce just outcomes nor am I even claiming that there is a strong consensus within

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175. For critiques of our cultural rights-orientation, see MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); *THE ESSENTIAL COMMUNITARIAN READER* (Amitai Etzioni ed., 1998).

our society that our trial system is just. (Empirical data about public perceptions of our court system shows mixed results.)<sup>176</sup> Rather, the hypothesis is that, to the extent it is accepted, the belief that trials produce just outcomes may buttress the practice of denial.

A bit of legal history may be helpful here. The belief that "right makes might" at trial—that the party in the right will prevail at trial—has deep roots within our culture.<sup>177</sup> Though we may now look back with incredulity, such a belief was essential to the earliest forms of trial within the Anglo system, namely, trials by ordeal and trials by battle. In a trial by ordeal, as part of a church ceremony, the accused might be made to grasp and hold a heated metal poker, thus burning his hand.<sup>178</sup> Justice was determined several days later by examining how the wound had healed, the presumption being that an omniscient God who would grant healing to the innocent but not to the guilty. Closer to our current system was trial by battle, where it was believed that God gave the party in the right, or their delegate, the strength to prevail in physical combat.<sup>179</sup> (The title "Esquire" we use for lawyers derives from this tradition, for delegated combatants were often of the sword-bearing squire class.<sup>180</sup> As is still true, powerful organizations, such as churches then and corporations today, could generally retain the best esquires.) Within such trial mechanisms, denial was to some extent legitimated for it was presumed the mechanism would produce just results.

A second area for further investigation is what one might call the linkage between the "microscopic" denial within ordinary legal disputes and "macroscopic" denial, that is, the use of denial after mass injury on a cultural level.

Though it is easy and unfortunately all too common to view our national history through rose-colored glasses, it must be remembered that our society was built in significant part upon the mass wrongs of conquest and slavery. (Other uncompensated mass wrongs, for example, concerning the subordination of women, exist in our nation's history as well, but for simplicity I will focus on these two.) Further, as we think about these mass injuries, two features are of particular note. First, the debt for these injuries essentially has never been paid. Second, rather than being the place where redress was to be found,

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176. See NAT'L CTR. FOR ST. CTS., HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY (1999); CAL. JUD. COUNCIL ADVISORY COMM. ON RACIAL AND ETHNIC BIAS IN THE CTS., FAIRNESS IN THE CALIFORNIA STATE COURTS: A SURVEY OF THE PUBLIC, ATTORNEYS AND COURT PERSONNEL (1994).

177. See Edward L. Rubin, *Trial by Battle. Trial by Argument*, 56 ARK. L. REV. 261 (2003).

178. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 114 (5th ed. 1956).

179. *Id.* at 115–16.

180. See OXFORD ENGLISH DICTIONARY (2d ed. 1989) (*sub verbo*).

the law was precisely the reverse—it was the final point of protection for the injurer. Denial, in other words, was a central component of these mass wrongs.

The lesson that it is acceptable to injure another without paying compensation (the essential rationale of injurers in ordinary legal disputes!) is nowhere clearer than in our nation's history. The North Atlantic slave trade and subsequent institution of slavery, critical building blocks in our nation's development, are among the greatest human rights violations in human history, yet, in essence, restitution has never been attempted.<sup>181</sup> (Think, by contrast, of German Holocaust reparations.) Indeed, efforts to even discuss the subject of reparations have largely been repressed.<sup>182</sup> So too the conquest of our country over Native Americans represents a mass injury for which restitution has never in essence been made.<sup>183</sup> Though certainly not the only nation so built, our nation was built in significant part through what one might call a "denial mindset" which utilized sophisticated ethnocentric and racist systems of thought to rationalize injury without compensation. Upon reflection, this is not surprising. For a structural injustice to persist across time, denial of the injustice is usually a critical component, for were the injustice recognized, it would be harder to maintain. Denial, in other words, is a common tool those who benefit from a structurally unjust society use to maintain that unjust society. To use the example of the Holocaust, the propaganda machine run by Joseph Goebbels—perhaps history's most proactive variant of denial—was essential in enabling the Nazis to commit mass atrocities.

Returning to the American examples, observe that a key factor enabling such gross uncompensated wrongs was the law. Rather than being a place of redress, the law served as the place of the ultimate insulation from redress for the injurer.<sup>184</sup> To call the law, which pur-

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181. See, e.g., BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973); RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES BLACKS* (2001); Graham Hughes, *Reparations for Blacks?*, 43 N.Y.U. L. REV. 1063 (1968); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998). For discussions of reparations for historical injustices in a variety of areas including, but not limited to, slavery, see *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (Roy L. Brooks ed., 1999) [hereinafter *WHEN SORRY ISN'T GOOD ENOUGH*].

182. ROBINSON, *supra* note 181, at 201.

183. See, e.g., Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453 (1994); Laurence A. French, *Native American Reparations: Five Hundred Years and Counting*, in *WHEN SORRY ISN'T ENOUGH*, *supra* note 181, at 241; William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2002–2003).

184. In this regard, these macroscopic examples differ from the ordinary civil case of injury where moral and legal responsibility overlap.



ported to be a means toward justice, "fraudulent" would be an understatement. As Robert Williams writes, "The West's conquest of the new world . . . [a]bove all . . . was a legal enterprise."<sup>185</sup> "[The Western legal system] vested superior rights of sovereignty over non-Western indigenous peoples . . . [and imposed] its vision of truth on non-Western peoples through a racist, colonizing rule of law."<sup>186</sup> The law, in other words, formally protected the injurer's right to injure without paying compensation. Even on those rare occasions where the injured might theoretically have a legal basis for relief, the law in practice removed that too.<sup>187</sup> Rather than being a place of accountability, the law was the means of denial.

Also of note is the role of lawyers in providing amoral, if not immoral, technical support. Now I do not mean to suggest that a lawyer who helps a guilty-in-fact party in an ordinary civil case avoid liability has moral culpability, if at all, anywhere near that of lawyers who drafted and enforced slave codes. Common, however, to the macro and micro settings is the technical approach of lawyers to their job. Though espousing a profession rhetoric of dedication to the pursuit of justice, in each case (though of course to different degrees), there is an element of obliviousness to underlying morality in service of a technical legal system. A bit like the executioner of Paris, it did not matter whom he was beheading, so long as the beheading was done properly.<sup>188</sup> Note too that, throughout its history, our legal system has been largely controlled by white men, the group principally benefitting from the aforementioned mass wrongs. Though women and minorities increasingly have entered the legal profession over the past decades, the modalities of thought and operation established by white men largely remain.<sup>189</sup>

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185. ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 6 (1990); see also Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 *LAW & INEQ.* 323 (1997). Regarding slavery, see ROBERT COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975) (discussing the willingness of judges who believed slavery immoral to uphold slave laws for formalistic reasons).

186. WILLIAMS, *supra* note 185, at 325.

187. See, e.g., JUAN PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 272 (2000) (commenting on the history of the Treaty of Guadalupe Hidalgo). The words of Desmond Tutu concerning not American but South African apartheid are instructive here: "No wonder the judicial system gained such a notorious reputation in the black community. It was taken for granted that the judges and magistrates colluded with the police to produce miscarriages of justice." DESMOND MPIOLO TUTU, *NO FUTURE WITHOUT FORGIVENESS* 24 (1999).

188. Arthur Isak Applbaum, *Professional Detachment: The Executioner of Paris*, 109 *HARV. L. REV.* 458 (1995).

189. See generally Menkel-Meadow, *supra* note 63.

Let me make a few further comments. It is not my suggestion that, for a culture to practice microscopic denial, historical patterns of macroscopic denial like those just noted are necessary. Unpacking the complex relationship between microscopic and macroscopic denial is more than I can do here. It is my belief, however, that generally speaking responsibility taking begets responsibility taking and denial begets denial.<sup>190</sup> Were we to practice greater responsibility taking in one area (either macroscopic or microscopic), perhaps there would be greater awareness about and impetus for practicing it in the other area. Piercing the denial mindset may well have ripple effects. Conversely, our failure to practice denial in one area may ultimately prove a barrier to our practicing it in others.

#### IV. CONCLUSION

Denying, rather than taking, responsibility after one injures another is a basic act of moral regression. Our legal system, however, helps mask that immoral act as normal. This is no small feat, and the ramifications of what one might call the "pattern defect" of legal denial are multifaceted. In terms of legal practice, lawyers should think seriously about discussing responsibility taking with clients. Though a client may benefit from denial economically, denial may harm the client's moral, psychological, and relational interests. A lawyer should not presume which factors the client values most, but rather learn the skills of legal counseling needed to explore such matters with clients. As a society, we should consider addressing structural factors that may buttress the practice of denial we see in ordinary civil legal disputes. Factors to consider include economic incentives within litigation, the nature of different dispute resolution mechanisms, the methodology of legal education, and even broader aspects of our cultural composition, such as rights-based ideology and social denials of structural injustices.

In many respects, this Article is a scholarly work descriptively analyzing the above-mentioned matters. Yet this Article also contains a basic prescriptive message about considering counseling responsibility taking aimed more at practicing lawyers and law students (for they soon will be practicing lawyers) than at scholars. It is in this latter vein that I will conclude. Some practicing lawyers and law students patient enough to have read this Article may respond with a variant of the following: "This idea of counseling responsibility taking is a little

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190. For a similar sentiment in religious vein, see *SIDDUR SIM SHALOM* 290 (Jules Harlow ed., 1985) ("You cannot find redemption until you see the flaws in your own soul, and try to efface them. Nor can a people be redeemed until it see the flaws in its soul and tries to efface them. But whether it be an individual or a people, whoever shuts out the realization of his flaws is shutting out redemption.").

'out there'. It's not what is commonly practiced. But perhaps you are right. Maybe we lawyers should sometimes talk with clients about taking responsibility? I don't really know." To such a person, I would make a two-fold recommendation. First, when the time is right for you, give it a try. On the day when you have a client who you think might benefit from such a conversation and with whom you feel you could have such a conversation, take the risk. Second, at some later point, reflect on the experience.